

ESTTA Tracking number: **ESTTA672933**

Filing date: **05/18/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91217273
Party	Plaintiff Monster Energy Company
Correspondence Address	DIANE M REED KNOBBE MARTENS OLSON & BEAR LLP 2040 MAIN STREE, 14TH FLOOR IRVINE, CA 92614 UNITED STATES efiling@knobbe.com, francie.leonguerrero@knobbe.com
Submission	Motion to Compel Discovery
Filer's Name	Jason A. Champion
Filer's e-mail	efiling@knobbe.com, francie.leonguerrero@knobbe.com, doreen.buluran@knobbe.com
Signature	/Jason A. Champion/
Date	05/18/2015
Attachments	2015-05-18 OPPOSER'S MOTION TO COMPEL-HANBEV.2514M.pdf(721812 bytes) 2015-05-18 JVC DECL IN SUPPORT OF OPPOSER'S MOTION TO COMPEL.pdf(156421 bytes) JVC Exhibit 01-HANBEV.2514M.PDF(1112046 bytes) JVC Exhibit 02-HANBEV.2514M.PDF(936501 bytes) JVC Exhibit 03-HANBEV.2514M.PDF(1890622 bytes) JVC Exhibit 04-HANBEV.2514M.PDF(1380793 bytes) JVC Exhibit 05-HANBEV.2514M.pdf(851777 bytes) JVC Exhibit 06-HANBEV.2514M.pdf(711059 bytes) JVC Exhibit 07-HANBEV.2514M.pdf(789483 bytes) JVC Exhibit 08-HANBEV.2514M.pdf(619515 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

MONSTER ENERGY COMPANY,

Opposer,

v.

THREE NOTCH'D BREWING COMPANY, LLC

Applicant.

Opposition No. 91217273

Serial No.: 85/920112

Mark:  **Three Notch'd**
BREWING COMPANY
Charlottesville, Va

OPPOSER'S MOTION TO COMPEL

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451
Dear Sir or Madam:

Pursuant to 37 C.F.R. § 2.120(e)(1) and Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 523, Opposer Monster Energy Company ("Opposer") respectfully moves for entry of an Order compelling Applicant Three Notch'd Brewing Company, LLC ("Applicant") to (1) produce all documents after conducting a reasonable search that are responsive to Opposer's Requests for Production of Documents and Things Nos. 1, 4, 5, 8, and 20-26, and (2) supplement Applicant's responses to Opposer's Interrogatories Nos. 10 and 13.

Opposer also requests that the Board suspend the opposition proceedings in light of this Motion to Compel pursuant to 37 C.F.R. § 2.120(e)(2) and TBMP § 523.01, and reset the dates in this proceeding to allow Opposer to reschedule its discovery depositions of Applicant and a


third party graphic designer, Okay Yellow Design Lab (“Okay Yellow”), which Opposer needed to postpone due to Applicant’s refusal to timely cure its discovery deficiencies.


As required by 37 C.F.R § 2.120(e)(1), counsel for Opposer has conferred with counsel for Applicant on several occasions in a good faith effort to resolve the issues raised in this Motion. Despite Opposer’s attempts to resolve these issues, Applicant has refused to supplement its responses and produce the documents requested by Opposer. This Motion is supported by the Declaration of Jason A. Champion (“Champion Decl.”) submitted herewith.

MEMORANDUM OF LAW

I. STATEMENT OF FACTS

A. Background Of Proceeding

Since at least 2002, Opposer has been, and still is, engaged in the development, production, marketing and sale of energy drinks and nutritional supplements bearing Opposer’s  ® mark (“Claw Icon”), and related marks (collectively, “Opposer’s marks”). Opposer owns a number of registrations for its marks for goods, such as beverages, including the registrations asserted in this Opposition. Opposer’s goods are sold, among other places, at establishments licensed to sell alcoholic beverages for consumption on the premises, such as restaurants, bars and nightclubs. Opposer’s marks are global brands that have appeared on billions of beverage cans and in extensive nationwide promotions.

Applicant’s registration of its  mark which, is the subject of U.S. Application Serial No. 85/920112 in connection with beer in Class 32 (“Applicant’s Mark”), will damage Opposer because consumers are highly likely to confuse Applicant’s Mark with Opposer’s marks. Applicant claims to be presently using its Mark in connection with many

different varieties of beer. Applicant's website asserts that products bearing Applicant's Mark are sold in more than 130 restaurants or retail establishments.

B. Opposer's Discovery Requests

Opposer timely served its First Set of Requests for Production of Documents and Things and First Set of Interrogatories on February 10, 2015. Champion Decl. ¶¶ 2, 3, Exs. 1, 2.¹ Opposer's Requests for Production that are at issue here seek documents relevant to issues in this proceeding, including the *DuPont* factors considered in determining likelihood of confusion. Opposer's Requests for Production seek the following general categories of documents:

- Documents relating to Applicant's sales and pricing information for goods sold under Applicant's Mark (Request Nos. 22-25);
- Documents relating to Applicant's marketing, business, and advertising plans, and expansion plans, for Applicant's Mark and variations of Applicant's Mark (Request Nos. 8, 20, and 21);
- Documents relating to any advertising agencies Applicant has used to promote Applicant's Mark (Request No. 26); and
- Documents relating to the origin, conception, selection, development adoption, and decision to use Applicant's Mark (Request Nos. 1, 4, and 5);

Id. ¶ 2, Ex. 1.

In response to a number of Opposer's Requests, including Request Nos. 8 and 20-26, Applicant has refused to produce any documents on the grounds that the information requested is not relevant to the proceedings. *See id.* ¶ 4, Ex. 3. However, these documents are highly relevant to the *DuPont* factors. With respect to the remaining requests at issue, Request Nos. 1, 4, and 5,

¹ All exhibits are attached to the Declaration of Jason A. Champion, filed concurrently herewith.

it does not appear that Applicant has produced all documents responsive to the requests. Applicant's total document production to date consists of 68 documents, many of which appear to be printed from Applicant's website.

Further, Applicant has refused to provide the information requested in Opposer's Interrogatory Nos. 10 and 13. *See id.* ¶¶ 5-6, Exs. 4-5. These interrogatories seek information relevant to the *DuPont* factors. Interrogatory No. 10 seeks information regarding Applicant's net and gross sales for goods sold under Applicant's Mark. *Id.* ¶ 3, Ex. 2. Interrogatory No. 13 seeks the amount Applicant has spent on advertising Applicant's Mark. *Id.*

C. Opposer's Attempts To Resolve These Discovery Disputes

Opposer made repeated attempts to resolve the disputed discovery issues before filing this Motion. Specifically, Opposer sent Applicant's counsel a letter detailing its positions, conducted two telephonic meet and confers, and engaged in follow-up correspondence, which included proposing a 30 day extension (to which Applicant would not agree) to allow the parties additional time to try to resolve the disputed issues. Champion Decl. ¶¶ 7-11, Exs. 6-8. Despite these good-faith attempts, Applicant refused to provide the information and documents that are the subject of this Motion. *Id.* ¶¶ 8-11, Exs. 7-8. Accordingly, Opposer proceeded with filing this Motion.

II. THE REQUESTS AND INTERROGATORIES AT ISSUE

A. The Requests For Production At Issue

The following are Opposer's Requests For Production at issue, and Applicant's written objections thereto.

REQUEST FOR PRODUCTION NO. 1:

All documents and things referring or relating to the origin, conception, derivation, selection and/or adoption of Applicant's Mark, including, but not limited to, how Applicant created, conceived, selected, cleared and acquired Applicant's Mark, whether in the United States or abroad.

RESPONSE:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to “or abroad.”

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant’s possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST FOR PRODUCTION NO. 4:

All documents and things referring or relating to the reasons Applicant selected Applicant’s Mark for the goods sold or offered for sale in connection with Applicant’s Mark.

RESPONSE:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad with respect to “for the goods sold or offered for sale in connection with Applicant’s Mark,” insofar as it purports to seek documents and things that pertain to goods other than the goods recited in U.S. Trademark Application Serial No. 85/920,112, namely beer.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant’s possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST FOR PRODUCTION NO. 5:

All documents and things sufficient to show the person or persons who assisted with or otherwise developed and/or created Applicant’s Mark.

RESPONSE:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as vague and ambiguous with respect to “[a]ll documents and things ... sufficient to show.” Applicant shall interpret the Request as seeking “documents and things ... sufficient to show.” Applicant further objects to this Request as vague and ambiguous with respect to “assisted with.”

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant’s possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST FOR PRODUCTION NO. 8:

All documents referring or relating to plans, including but not limited to, marketing plans, advertising plans, and business forecasts, by Applicant to adopt or use additional marks that

include the following portion of Applicant's Mark:

RESPONSE:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents" including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence, with respect to "plans, including ... marketing plans, advertising plans, and business forecasts." Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence, with respect to "additional marks" and with respect to a "portion" of Applicant's Mark, insofar as it purports to seek documents and things that pertain to marks other than Applicant's Mark, or to Applicant's Mark other than in its entirety.

REQUEST FOR PRODUCTION NO. 20:

All marketing and business plans relating to Applicant's Goods.

RESPONSE:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll ... plans," including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 21:

All documents and things concerning your efforts and/or intent to expand Applicant's Mark to different product lines or geographical areas.

RESPONSE:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents and things," including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 22:

Documents sufficient to show, on a monthly basis, your total net and gross sales (both in units and dollars) and total net and gross profits for each of Applicant's Goods.

RESPONSE:

Applicant objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Request as overly broad with respect to "on a monthly basis," including because it seeks documents and things that may not be in the possession, custody, or control of Applicant.

REQUEST FOR PRODUCTION NO. 23:

Documents sufficient to show, on a monthly basis, your total net and gross sales (both in units and dollars) for each of Applicant's Goods by geographic area.

RESPONSE:

Applicant objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Request as overly broad with respect to "on a monthly basis," including because it seeks documents and things that may not be in the possession, custody, or control of Applicant.

REQUEST FOR PRODUCTION NO. 24:

Sales summaries or sales reports for Applicant's Goods.

RESPONSE:

Applicant objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 25:

Documents sufficient to show the prices charged for Applicant's Goods, including, but not limited to, price lists for the products.

RESPONSE:

Applicant objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 26:

All documents and things referring or relating to any and all advertising agencies, public relations agencies, marketing firms, market research agencies or other person(s) which Applicant has used, participated with or cooperated with in advertising, marketing or promoting any of Applicant's Goods.

RESPONSE:

Applicant objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

B. The Interrogatories At Issue

The following are Opposer's interrogatories at issue, and Applicant's responses thereto.

INTERROGATORY 10:

State your net and gross sales (in units and dollars) and net and gross profits, on a monthly basis, for each of Applicant's Goods since the date of first sale of each product.

RESPONSE:

Applicant objects to this Interrogatory as vague and ambiguous with respect to "net and gross profits ... for each of Applicant's Goods since the date of first sale of each product." It is

unclear, for instance, whether the Interrogatory seeks information regarding the “net and gross profits” for all beer sold under Applicant’s Mark, or the “net and gross profits” for each variety of beer sold under Applicant’s Mark. Applicant further objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as overly broad with respect to “each of Applicant’s Goods,” to the extent it purports to seek information regarding goods not recited in U.S. Trademark Application Serial No. 85/920, 112. Applicant further objects to this Interrogatory as overly broad with respect to “on a monthly basis.”

INTERROGATORY 13:

Identify, on an annual basis, the dollar amount Applicant spent on advertising Applicant’s Mark from the date of first use to the present.

RESPONSE:

Applicant objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as vague and ambiguous insofar as it requests the “amount ... spent on advertising Applicant’s Mark” as opposed to the beer sold in connection with Applicant’s Mark.

III. LEGAL STANDARD

A motion to compel discovery should be granted where, as here, (1) Opposer makes a good faith attempt to resolve the matter, yet (2) Applicant refuses to provide responses to properly served interrogatories or produce documents responsive to Opposer’s document requests. *See* 37 C.F.R. § 2.120(e); TBMP §§ 523.01-02. “[E]vasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer or respond.” Fed. R. Civ. P. 37(a)(4). Moreover, Applicant has a duty to thoroughly search its records for all information properly sought and provide such information within the time allowed for responding. *See* TBMP § 408.02.

IV. ARGUMENT

A. Applicant Should Be Ordered To Produce Documents Responsive To Opposer's Requests For Production Nos. 1, 4, 5, 8, and 20-26

1. Applicant Should Produce Sales And Pricing Information For Goods Sold Under Applicant's Mark (Request Nos. 22-25)

Opposer's Request for Production Nos. 22-25 seek documents relating to sales and pricing for Applicant's goods bearing Applicant's Mark.² Applicant objected that the requested documents are irrelevant and refused to produce any documents responsive to the requests. Champion Decl. ¶¶ 4, 8-10, Exs. 3, 7. Applicant's objections are without merit.

The sales documents sought in Request for Production Nos. 22-24 are relevant to the issues in this proceeding, including likelihood of confusion. TBMP § 414, in describing various discovery determinations previously made by the Board, explicitly notes that "[a]nnual sales and advertising figures, stated in round numbers, for a party's involved goods or services sold under its involved mark are proper matters for discovery...." *See also Sunkist Growers, Inc. v. Benjamin Ansehl Co.*, 229 U.S.P.Q. 147, 149 (TTAB 1985) (finding that "annual sales and advertising figures of recent years given in round numbers for specific goods bearing the involved mark(s) are proper matters for discovery since the information may well have a bearing upon the issues in an opposition or cancellation proceeding"); *American Optical Corp. v. Exomet, Inc.*, 181 U.S.P.Q. 120, 123 (TTAB 1974) (granting opposer's motion to compel Applicant to provide information regarding the extent of sales and advertising expenditures because it "may well have a bearing on the question of likelihood of confusion"), overruled in part on other grounds by *Johnson & Johnson v. Rexall Drug Co.*, 186 U.S.P.Q. 167, 172

² Document Request No. 22 also sought profit information, in addition to sales information. During the meet and confer on this request, Opposer agreed to limit the request to only sales information. *See* Champion Decl. ¶ 8.

(T.T.A.B. 1975). For example, the extent of Applicant's sales is relevant to assessing the opportunity for confusion to have occurred. Request for Production No. 23, which seeks sales by geographic area, is also relevant for a similar reason. The sales information sought by that request is relevant to identifying specific geographic regions where actual confusion may have been likely to occur.

The pricing documents for the goods sold under Applicant's Mark sought in Request for Production No. 25 are also relevant to the *DuPont* factors. For example, the pricing information is relevant to the level of sophistication of consumers (impulse vs. deliberate purchasing), the degree of care exercised by purchasers, and marketing channels. *See, e.g., B.V.D. Licensing Corp. v. Rodriguez*, 83 U.S.P.Q.2d 1500, 1507 (T.T.A.B. 2007) ("The relatively low cost of the involved clothing items and the fact that they may frequently be purchased on impulse is another factor that increases the likelihood of confusion."); *see also Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 U.S.P.Q.2d 1894, 1899 (Fed. Cir. 2000) ("When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care."). Although Applicant provided some pricing information in its response to one of Opposer's interrogatories, Applicant has not produced any documents to support the accuracy of those numbers.


Accordingly, Opposer request that the Board order Applicant to produce documents responsive to Opposer's Request for Production Nos. 22-25.

2. Applicant Should Produce Documents Relating To Its Marketing, Business, And Expansion Plans (Request Nos. 8, 20, and 21)





Opposer's Requests for Production Nos. 8, 20, and 21 seek documents relating to Applicant's marketing, business, and expansion plans relating to Applicant's Mark and goods bearing Applicant's Mark. Applicant objected to these requests and did not agree in their written

objections to produce any documents responsive to these requests. Champion Decl. ¶ 4, Ex. 3. It remains unclear whether Applicant is withholding documents responsive to these requests. While Applicant represented that it would confirm whether it had documents responsive to the requests, Applicant did not do so. *See* Champion Decl. ¶¶ 10-11, Ex. 8. Accordingly, Opposer requests that Board order Applicant to conduct a reasonable search for documents responsive to the requests and produce all responsive documents that are located.

Applicant primarily objects to the requests on the basis of relevancy. Applicant's relevancy objections are baseless. Documents relating to advertising, promotional activities and business plans are highly relevant to the *DuPont* factors, such as the opportunity for actual confusion in the marketplace to occur and the similarity of the trade channels used or the trade channels in which Applicant's goods are likely to expand. *See* TBMP § 414 (listing exemplary discovery determinations, and identifying "a party's plans for expansion" as information that may be discoverable); *see also Baxter Int'l Inc. v. Inviro Med. Devices Ltd*, Opp. No. 150, 298, 2003 WL 22273114, at *2 (T.T.A.B. Sept. 25, 2003) (granting opposer's motion to compel and ordering the applicant to "identify intended channels of trade, advertising, target markets, and competitors to the extent that [applicant] is aware of any"); *Johnston Pump/General Valve, Inc. v. Chromalloy Am. Corp.*, 10 U.S.P.Q.2d 1671, 1675 (TTAB 1988) (finding that the opposer's intent to expand its business to include manufactured products similar to applicant's products is relevant).

Applicant further objects to Request for Production No. 8 as irrelevant because it seeks documents relating to the  portion of Applicant's Mark and is not limited to Applicant's Mark in its entirety. However, the requested documents are relevant to the *DuPont* factors, such

as Applicant's intent in adopting its  mark and the similarity of the party's

marks. *See M2 Software, Inc. v. M2 Communs., Inc.*, 450 F.3d 1378, 1384-1385 (Fed. Cir. 2006) (finding of Applicant's bad intent in applying for mark can be relevant to likelihood of confusion analysis). Documents relating to Applicant's use and planned use of other  marks may evidence a continuing pattern of attempting to benefit from the goodwill of Opposer's marks, including Opposer's  marks. For example, it appears that Applicant is already using the  portion of its mark in a vertical orientation, , on the packaging of some of Applicant's goods. Such a pattern would suggest further bad faith or intent to confuse on the part of Applicant in adopting Applicant's Mark. *See, e.g., L'Oreal S.A. v. Marcon*, 102 U.S.P.Q.2d 1434, 1441 (T.T.A.B. 2012) (finding "[a]pplicant's demonstrated pattern of filing applications to register various well-known marks convinces us that applicant's adoption of [opposer's] mark was in bad faith Such bad faith is strong evidence that confusion is likely, as such an inference is drawn from the imitator's expectation of confusion.").

Applicant raised other objections to the requests, including that the requests were allegedly overly broad and unduly burdensome. However, Applicant has not explained or justified those objections. For example, Applicant has given no reasons as to why it would be difficult, let alone unduly burdensome, to search for the documents sought by the requests.

Accordingly, Opposer requests that the Board overrule Applicant's objections to Requests for Production Nos. 8, 20, and 21, conduct a reasonable search for documents responsive to the requests, and produce all responsive documents that Applicant locates.

3. Applicant Should Produce Documents Relating To Advertising Agencies It Has Used (Request No. 26)

Opposer's Request for Production No. 26 seeks documents relating to advertising agencies, public relations agencies, and other similar agencies that Applicant has used to advertise or promote goods sold under Applicant's Mark. Applicant objected that the requested documents are irrelevant and refused to produce any documents in response to the request. Champion Decl. ¶ 4, Ex. 3.

The requested documents are relevant to these proceedings. For example, TBMP § 414 notes: "The identity of any advertising agency engaged by a party to advertise and promote the party's involved goods or services under its involved mark is discoverable, as is the identity of the advertising agency employees having the most knowledge of such advertising and promotion." The requested documents may lead to further discovery of relevant information regarding, for example, the selection of Applicant's Mark. *See J. B. Williams Co. v. Pepsodent G.m.b.H.*, 188 U.S.P.Q. 577, 580 (T.T.A.B. 1975) ("[T]he disclosure of the identity of the agency and of the most knowledgeable people therein involved in the promotion of a party's mark or marks may conceivably lead to the discovery of relevant information such as the circumstances surrounding the selection of the mark, its distinctiveness or lack thereof, or any other relevant information that may well have a bearing on issues normally involved in inter partes proceedings before the Board.").

Accordingly, Opposer requests that the Board order Applicant to produce documents responsive to Opposer's Request for Production No. 26.

4. Applicant Should Conduct A Reasonable Search For And Produce Documents Relating To The Origin, Development, And Decision To Use Applicant's Mark (Request Nos. 1, 4, and 5)

Opposer's Request for Production Nos. 1, 4, and 5 seek documents relating to the development and selection of Applicant's Mark. Applicant objected to the requests as allegedly overly broad and unduly burdensome. However, Applicant has given no explanation why it would be burdensome to locate and produce documents responsive to the requests. Accordingly, those objections should be overruled.

Subject to its objections, Applicant agreed in its written responses to produce documents responsive to Request for Production Nos. 1, 4, and 5. Champion Decl. ¶ 4, Ex. 3. While Applicant asserted during the parties' meet and confers regarding these requests that Applicant had produced responsive documents, Applicant's document production has been minimal. *Id.* ¶ 10. Moreover, the documents and information that Opposer has received suggest that Applicant has not made the requisite reasonable inquiry in responding to Opposer's document requests. *See* TBMP § 408.02 ("A party served with a request for discovery has a duty to thoroughly search its records for all information properly sought in the request, and to provide such information to the requesting party within the time allowed for responding to the request.").

For example, Opposer's Interrogatory No. 1 states that the design and development of Applicant's Mark involved Three Notch'd Founder George Kastendike along with Paul Dierkes and Joel Artz of Okay Yellow, a graphic design company. Champion Decl. ¶ 5, Ex. 4. However, there is not a single communication between or among any of these individuals in Applicant's production. In fact, Applicant's production is devoid of any references to Mr. Dierkes, Mr. Artz, or Okay Yellow generally.

Moreover, in response to a third-party document subpoena served by Opposer on Okay Yellow that requested, among other things, documents relating to the development of

Applicant's Mark, Okay Yellow produced emails between Mr. Kastendike and individuals at Okay Yellow that Applicant had not produced. Champion Decl. ¶ 12. The same emails also revealed that several of Applicant's other employees were privy to communications and discussions relating to the development and design of Applicant's Mark, but not a single one of these individuals' records appears to have been searched in response to Opposer's requests. *See id.*

The documents received from Okay Yellow also reveal that at least some of Applicant's employees have individual, company email accounts. *Id.* Consequently, those email accounts should be archived or otherwise searchable. However, Applicant has not produced a single email in response to Opposer's requests. *See id.*

In view of the foregoing facts, Applicant's *de minimis* production in response to Request for Production Nos. 1, 4, and 5 is troubling to say the least. Accordingly, Opposer requests that the Board order Applicant to conduct a reasonable search for documents responsive to Request for Production Nos. 1, 4, and 5 and produce all responsive documents that are located.

B. Applicant Should Be Ordered To Respond To Opposer's Interrogatory Nos. 10 and 13

1. Interrogatory No. 10

Opposer's Interrogatory No. 10 seeks information regarding Applicant's net and gross sales for goods sold under Applicant's Mark. The objections raised by Applicant to the interrogatory are unfounded.³

³ Interrogatory No. 10 also sought profit information, in addition to sales information. During the meet and confer, Opposer agreed to limit the interrogatory to only sales information. Champion Decl. ¶ 8. Accordingly, the vague and ambiguous objections raised by Applicant as to the requested profit information need not be addressed.

Applicant's primary objection is that the sales information sought by the interrogatory was irrelevant. However, for the reasons discussed in Section IV.A.1, *infra*, sales information for products sold under Applicant's Mark are relevant, including to the issue of likelihood of confusion. *See, e.g.*, TBMP § 414 (noting that "[a]nnual sales and advertising figures, stated in round numbers, for a party's involved goods or services sold under its involved mark are proper matters for discovery...."); *see also Sunkist Growers*, 229 U.S.P.Q. at 149; *American Optical*, 181 U.S.P.Q. at 123.

Applicant also objected that the interrogatory was overly broad with respect to "each of Applicant's Goods" to the extent the interrogatory seeks to include goods not recited in Applicant's application. However, Opposer made clear during the meet and confer on this interrogatory that Opposer seeks sales information for the goods identified in Applicant's application, namely beer. *See* Champion Decl. ¶ 8.

Finally, Applicant also objected that the interrogatory is overly broad because it seeks sales information on a monthly basis. Applicant has not explained why it would be unable to provide sales information on a monthly basis. But regardless, Opposer is willing to accept sales information on a different time basis, such as annually.

In sum, sales information for products sold by Applicant bearing Applicant's goods are directly relevant to this proceeding. Applicant's steadfast refusal to provide any sales information in response to Interrogatory No. 10 is completely unjustified. Accordingly, Opposer requests that the Board order Applicant to respond to Interrogatory No. 10 to provide the requested sales information.

2. Interrogatory No. 13

Opposer's Interrogatory No. 13 seeks the amount Applicant has spent on advertising Applicant's Mark. Opposer has refused to provide any information in response to this interrogatory. Opposer's refusal to respond to the interrogatory is unjustified.

Opposer's primary objection is that the information sought by the interrogatory is irrelevant to these proceedings. However, the amount spent by Applicant in advertising its mark – which bears a direct correlation to the extent Applicant's Mark has been used – is relevant to assessing the likelihood of confusion. *See Volkswagenwerk Aktiengesellschaft v. MTD Prods. Inc.*, 181 U.S.P.Q. 471, 473 (TTAB 1974) (finding that Applicant's advertising expenditures for the goods in the application is discoverable); *see also* TBMP § 414 ("Annual sales and advertising figures, stated in round numbers, for a party's involved goods or services sold under its involved mark are proper matters for discovery....").

Applicant also argues that the interrogatory is vague and ambiguous. However, the interrogatory is clear in the information sought.

Applicant's refusal to provide the information requested in Interrogatory No. 13 is improper. Accordingly, Opposer requests that the Board order Applicant to respond to Interrogatory No. 13 to provide the requested advertising expenditure information.

V. CONCLUSION

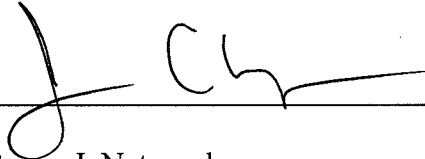
For the foregoing reasons, Opposer requests that the Board grant the present motion and order Applicant to: (1) conduct a reasonable search for and produce all documents responsive to Opposer's Request for Production Nos. 1, 4, 5, 8, and 20-26, and (2) provide the requested sales and advertising expenditure information sought in Opposer's Interrogatory Nos. 10 and 13. Finally, Opposer requests that the Board suspend these proceedings and reset the dates upon resolution of the motion so that Opposer can complete the depositions it previously noticed but

postponed in view of Applicant's refusal to provide the documents and information that are the subject of this motion.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: 5/18/15


By: 

Steven J. Nataupsky
Diane M. Reed
Jason A. Champion
Jonathan A. Menkes
2040 Main Street, Fourteenth Floor
Irvine, CA 92614
(949) 760-0404
efiling@kmob.com
Attorneys for Applicant,
MONSTER ENERGY COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **OPPOSER'S MOTION**
TO COMPEL has been served on Thomas F. Bergert, Applicant's counsel of record by mailing
one copy on May 18, 2015 via First Class mail to:

Thomas F. Bergert
WILLIAMS MULLEN
321 E. Main Street, Suite 400
Charlottesville, VA 22902-3200

Signature: 

Name: Doreen P. Buluran

Date: May 18, 2015

20671175

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

MONSTER ENERGY COMPANY,

Opposer,

v.

THREE NOTCH'D BREWING COMPANY, LLC

Applicant.

Opposition No. 91217273

Serial No.: 85/920112

Mark:  **Three Notch'd**
BREWING COMPANY
Charlottesville, Va

**DECLARATION OF JASON A. CHAMPION IN SUPPORT OF OPPOSER'S MOTION
TO COMPEL**

I, Jason A. Champion, declare as follows:

1. I am an attorney licensed to practice in the State of California. I am an associate with the law firm of Knobbe, Martens, Olson & Bear LLP, counsel for Opposer, Monster Energy Company ("Opposer") in the above-identified Opposition proceeding. I have personal knowledge of the facts set forth below. If called upon and sworn as a witness, I could and would competently testify as set forth below.
2. A true and correct copy of Opposer's First Set of Requests for Production of Documents and Things Nos. 1-58, served on Applicant on February 10, 2015, is attached hereto as Exhibit 1.
3. A true and correct copy of Opposer's First Set of Interrogatories Nos. 1-29, served on Applicant on February 10, 2015, is attached hereto as Exhibit 2.

4. A true and correct copy of Applicant's Responses to Opposer's First Set of Requests for Production of Documents and Things Nos. 1-58, served on March 17, 2015, is attached hereto as Exhibit 3.

5. A true and correct copy of Applicant's Responses to Opposer's First Set of Interrogatories Nos. 1-29, served on March 17, 2015, is attached hereto as Exhibit 4.

6. A true and correct copy of Applicant's Supplemental Responses to Opposer's First Set of Interrogatories Nos. 9, 14, and 27-28, served on May 14, 2015, is attached hereto as Exhibit 5.

7. On May 1, 2014, Opposer's counsel sent Applicant's counsel a letter detailing Applicant's discovery deficiencies and requesting that Applicant supplement its responses to several of Opposer's Interrogatories and Requests for Production. A true and correct copy of a letter sent by my colleague Jonathan A. Menkes to Applicant's counsel Thomas F. Bergert, on May 1, 2015, is attached hereto as Exhibit 6.

8. On May 7, 2015, my colleague Jonathan A. Menkes and I participated in a meet and confer with Applicant's counsel Robert C. Van Arnam. During the meet and confer, Applicant's counsel maintained Applicant's objections to Opposer's Request for Production Nos. 8 and 20-26, and said that Applicant did not intend to supplement its document production with respect to these requests. Applicant's counsel also maintained Applicant's objections to Opposer's Interrogatory Nos. 10 and 13 and said that Applicant did not intend to provide supplemental responses with respect to these interrogatories. With respect to the financial information sought by Request For Production Nos. 22-24 and Interrogatory No. 10, I explained that Opposer was willing to limit them to documents and information sufficient to ascertain the approximate sales numbers for all goods identified in Applicant's application – namely, beer –

sold under Applicant's Mark. Applicant's counsel maintained his position that any sales information was irrelevant and beyond the scope of discovery in this proceeding.

9. On May 8, 2015, Applicant's counsel sent a letter to me reiterating Applicant's position as stated during the May 7, 2015 meet and confer, and further maintaining Applicant's objections to Opposer's Request for Production Nos. 8, and 20-26, and Interrogatory Nos. 10 and 13. A true and correct copy of a letter sent by Mr. Van Arnam to my colleague Jonathan Menkes and I on May 8, 2015, is attached hereto as Exhibit 7.

10. On May 12, 2015, I participated in a second meet and confer with Mr. Van Arnam and his colleague Neil Magnuson. During the meet and confer, Mr. Van Arnam and Mr. Magnuson continued to advocate the positions set forth in Mr. Van Arnam's May 8, 2015 letter and maintained their objections to Opposer's Request for Production Nos. 22-25 and Interrogatory Nos. 10 and 13. With respect to Opposer's Request for Production Nos. 8, 20, and 21, Applicant's counsel maintained the position that such documents were not discoverable, but thought that documents responsive to the requests might not exist, and said they would inquire with Applicant on this issue. However, Applicant's counsel never provided confirmation as to whether responsive documents exist. During the meet and confer I also inquired about apparent deficiencies in Applicant's March 18, 2015, document production and whether Applicant intended to supplement its production with documents responsive to Opposer's Requests Nos. 1, 4, and 5. Mr. Van Arnam and Mr. Magnuson informed me that Applicant had produced all responsive non-privileged documents with respect to these requests.

11. Immediately following the May 12, 2015 meet and confer, I sent Applicant's counsel an email summarizing the substance of our meet and confer and requesting a 30 day extension of the schedule to allow the parties additional time to try and resolve the disputed

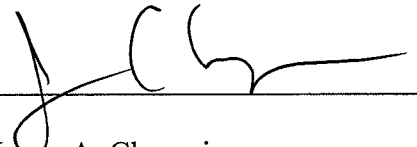
issues. Counsel for Applicant sent me an email in response refusing to agree to the proposed extension. A true and correct copy of the email correspondence between myself and Mr. Van Arnam following the May 12, 2015 meet and confer is attached hereto as Exhibit 8.

12. On May 13, 2015, third-party Okay Yellow Design Lab ("Okay Yellow") responded to a subpoena for documents served by Opposer on April 29, 2015. In response to the subpoena, Okay Yellow produced documents including emails between several of Applicant's employees and individuals at Okay Yellow relating to the design and development of Applicant's Mark. The emails produced by Okay Yellow also revealed that Applicant's employees who communicated with Okay Yellow did so from email accounts ending in "@3notchedbrewing.com." Applicant's March 18, 2015 initial production and May 14, 2015 supplemental production did not contain any of the emails produced by Okay Yellow or any emails from any accounts ending in "@3notchedbrewing.com."

Dated: _____

5/18/15

By: _____


Jason A. Champion

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **DECLARATION OF JASON A. CHAMPION IN SUPPORT OF OPPOSER'S MOTION TO COMPEL** has been served on Thomas F. Bergert, Applicant's counsel of record by mailing one copy on May 18, 2015 via First Class mail to:

Thomas F. Bergert
WILLIAMS MULLEN
321 E. Main Street, Suite 400
Charlottesville, VA 22902-3200

Signature: 

Name: Doreen P. Buluran

Date: May 18, 2015

20680917

TTAB Opposition No. 91217273

Monster Energy Company v. Three Notch'd Brewing Company, LLC

EXHIBIT 1

wholly-owned or partially-owned subsidiary, predecessor, successor, or affiliate either within the United States or a foreign country.

2. The term “Opposer” shall refer to Monster Energy Company, and any present or former owner, officer, director, employee, servant, agent, attorney or other representative acting on its behalf, and shall include any related entity, parent corporation, or wholly-owned or partially-owned subsidiary, predecessor, successor, or affiliate either within the United States or a foreign country.

3. The term “you” or “your” shall mean Applicant.

4. The term “and” shall be construed to include “or” and *vice versa*, and shall be the logical equivalent of “and/or,” as necessary in order to bring within the scope of the Document Request all responses which might otherwise be construed as outside its scope.

5. The term “document” is used in the broadest sense permitted by the FRCP and expressly includes without limitation any tangible thing upon which information is or has been stored, recorded, or communicated and any written, printed, typed, and visually or aurally reproduced material of any kind, whether or not privileged, such as (by way of example and not by way of limitation) correspondence, letters, notes, memoranda, diaries, invoices, purchase orders, records, minutes, bills, contracts, agreements, orders, receipts, price lists, studies, drawings or sketches, telephone messages, films, pictures, photographs, electronic mail, microfilm, magnetic media (including but not limited to hard disks or drives, floppy disks, compact disks, CD-ROMs, DVD-ROMs, and magnetic tapes of any kind) tapes or discs capable of being mechanically read, advertising or promotional literature, operating manuals or instruction bulletins, cables or telegrams, maps, charts, surveys, test data, reports, tape or other recordings, HTML code, and Internet website pages, every copy of every such writing or record where the original is not in the possession,

custody, or control of Applicant, and every copy of every such writing or record where such copy is not an identical copy of the original or where such copy contains any commentary that does not appear on the original.

6. The term “thing” shall mean all tangible objects of any type, composition, construction or nature.

7. A document or thing “relating” or which “relates” to any given subject means any document or thing that comprises, constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any way pertinent to that subject, including, without limitation, documents concerning the preparation of other documents.

8. The term “concerning” means relating to, referring to, describing, evidencing or constituting.

9. The use of the singular form of any word also includes the plural and *vice versa*.

10. The phrases “use in commerce,” “use in United States commerce,” “used in commerce” and “used in United States commerce,” and similar phrases, shall mean and refer to the definition provided under 15 U.S.C. § 1127.

11. The term “person” shall include both natural persons and corporate or other business entities, whether or not in the employ of Applicant, and the acts and knowledge of a person are defined to include the acts and knowledge of that person’s directors, officers, members, employees, representatives, agents and attorneys.

12. The terms “trademark” or “mark” shall include trademarks, service marks, collective marks, certification marks and trade names as defined in 15 U.S.C. § 1127.

13. The term “Applicant’s Mark” shall mean and refer to the mark



that is the subject of U.S. Trademark Application Number

85/920112.

14. “Applicant’s Application” shall mean U.S. Trademark Application Serial Number 85/920112.

15. “Notice of Opposition” shall refer to the Notice of Opposition filed in connection with this opposition - Opposition No. 91217273.

16. The term “Applicant’s Goods” shall mean and refer to the goods Applicant offers or sells, has offered or sold, or intends to offer or sell, in connection with Applicant’s Mark, including, but not limited to, the goods in International Class 32 identified in Applicant’s Application, namely, beer.

17. The term “Opposer’s Marks” shall collectively refer to all of Opposer’s trademarks identified in Opposer’s Notice of Opposition.

18. The term “Opposer’s Goods” shall mean and refer to all of the goods covered under Opposer’s Marks or as alleged in Opposer’s Notice of Opposition.

GENERAL INSTRUCTIONS

1. If you claim that any document requested is privileged, please provide all information falling within the scope of the Document Request which is not privileged, and identify with sufficient particularity for purposes of a Motion to Compel each item, document or thing, separately, with respect to which you claim a privilege, and state:

- (a) the basis on which the privilege is claimed;
- (b) the author of the document, if applicable;
- (c) each individual or other person to whom the document or copy thereof was sent or otherwise disclosed;
- (d) the date of the document;

- (e) the type of the document (e.g., letter, memorandum, etc.); and
- (f) the general subject matter of the document.

You are not requested to provide privileged information or information for which you claim privilege, but only to identify such information, document, or thing.

3. The documents produced pursuant to these Document Requests shall be separately produced for each paragraph of the same or, in the alternative, shall be identified as complying with the particular paragraphs of the Document Requests to which they are responsive.

4. Applicant's responses to the following Document Requests are to be promptly supplemented to include subsequently acquired information in accordance with the requirements of Rule 26(e) of the FRCP.

REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

REQUEST FOR PRODUCTION NO. 1:

All documents and things referring or relating to the origin, conception, derivation, selection and/or adoption of Applicant's Mark, including, but not limited to, how Applicant created, conceived, selected, cleared and acquired Applicant's Mark, whether in the United States or abroad.

REQUEST FOR PRODUCTION NO. 2:

All documents and things referring or relating to all variations and versions of Applicant's Mark, whether final or not and whether used or not, which were considered or developed for Applicant's Goods.

REQUEST FOR PRODUCTION NO. 3:

All documents and things relating to the past use, present use, or plans for future use of any colors in connection with Applicant's Mark.

REQUEST FOR PRODUCTION NO. 4:

All documents and things referring or relating to the reasons Applicant selected Applicant's Mark for the goods sold or offered for sale in connection with Applicant's Mark.

REQUEST FOR PRODUCTION NO. 5:

All documents and things sufficient to show the person or persons who assisted with or otherwise developed and/or created Applicant's Mark.

REQUEST FOR PRODUCTION NO. 6:

All documents and things referring or relating to any searches (including trademark searches), research, inquiries or investigations conducted by you or on your behalf relating to Applicant's Mark.

REQUEST FOR PRODUCTION NO. 7:

All documents and things referring or relating to any searches (including trademark searches), research, inquiries or investigations conducted by you or on your behalf relating to Opposer's Marks.

REQUEST FOR PRODUCTION NO. 8:

All documents referring or relating to plans, including but not limited to, marketing plans, advertising plans, and business forecasts, by Applicant to adopt or use additional marks that

include the following portion of Applicant's Mark:



REQUEST FOR PRODUCTION NO. 9:

All documents and things identified in your Initial Disclosures.

REQUEST FOR PRODUCTION NO. 10:

All documents referred to, relied upon and/or reviewed by you in connection with your response to Opposer's Interrogatories.

REQUEST FOR PRODUCTION NO. 11:

All documents and things identified or relied upon in your responses to Opposer's Requests for Admissions.

REQUEST FOR PRODUCTION NO. 12:

All documents and things referring or relating to the date of first sale of each good bearing Applicant's Mark.

REQUEST FOR PRODUCTION NO. 13:

All documents and things referring or relating to the first commercial use of Applicant's Mark, including any samples, advertisements, marketing plans and invoices.

REQUEST FOR PRODUCTION NO. 14:

Documents and things sufficient to identify each person involved in deciding when and how Applicant's Mark would be used in commerce.

REQUEST FOR PRODUCTION NO. 15:

Documents and things sufficient to identify all goods that have been sold, are currently being sold, or will be sold in connection with Applicant's Mark.

REQUEST FOR PRODUCTION NO. 16:

Documents and things sufficient to demonstrate each state that Applicant has shipped or sold Applicant's Goods.

REQUEST FOR PRODUCTION NO. 17:

Documents and things sufficient to show your continuous use of Applicant's Mark since the date of first use to the present.

REQUEST FOR PRODUCTION NO. 18:

Representative samples of each product, label, tag, packaging, container, sign, brochure, advertisement or catalog showing Applicant's past use, current use, and intended use of Applicant's Mark, including products with variations of Applicant's Mark.

REQUEST FOR PRODUCTION NO. 19:

Documents sufficient to show each product or service offered or sold by you or that have been licensed and/or distributed by Applicant or any other person or entity authorized by Applicant.

REQUEST FOR PRODUCTION NO. 20:

All marketing and business plans relating to Applicant's Goods.

REQUEST FOR PRODUCTION NO. 21:

All documents and things concerning your efforts and/or intent to expand Applicant's Mark to different product lines or geographical areas.

REQUEST FOR PRODUCTION NO. 22:

Documents sufficient to show, on a monthly basis, your total net and gross sales (both in units and dollars) and total net and gross profits for each of Applicant's Goods.

REQUEST FOR PRODUCTION NO. 23:

Documents sufficient to show, on a monthly basis, your total net and gross sales (both in units and dollars) for each of Applicant's Goods by geographic area.

REQUEST FOR PRODUCTION NO. 24:

Sales summaries or sales reports for Applicant's Goods.

REQUEST FOR PRODUCTION NO. 25:

Documents sufficient to show the prices charged for Applicant's Goods, including, but not limited to, price lists for the products.

REQUEST FOR PRODUCTION NO. 26:

All documents and things referring or relating to any and all advertising agencies, public relations agencies, marketing firms, market research agencies or other person(s) which Applicant has used, participated with or cooperated with in advertising, marketing or promoting any of Applicant's Goods.

REQUEST FOR PRODUCTION NO. 27:

Representative samples of documents and things referring or relating to advertising, marketing and/or promotion of Applicant's Mark or of Applicant's Goods, including, but not limited to: media in which Applicant's Mark appears, labels, boxes, packaging, stickers, advertisements, brochures, flyers, pamphlets, promotional materials, magazines, articles, billboards, radio advertisements, television advertisements, Internet advertisements or other printed or electronic publications, websites or domain names.

REQUEST FOR PRODUCTION NO. 28:

All press releases issued by or on behalf of Applicant that refer to Applicant's Mark.

REQUEST FOR PRODUCTION NO. 29:

All documents and things reflecting any mention in the press of Applicant's Mark, including any Internet web pages, magazines, newspapers or other printed publications that contain an article or other story relating to goods sold or offered for sale in connection with Applicant's Mark.

REQUEST FOR PRODUCTION NO. 30:

All documents and things referring or relating to printed publications Applicant has advertised in, plans to advertise in or intends to advertise Applicant's Goods.

REQUEST FOR PRODUCTION NO. 31:

All documents and things referring or relating to the channels of trade through which Applicant sells, offers for sale, or intends to sell Applicant's Goods.

REQUEST FOR PRODUCTION NO. 32:

All documents and things referring or relating to any expansion or alteration of the channels of trade and/or plans to alter or expand the channels of trade through which Applicant sells or offers for sale any of Applicant's Goods.

REQUEST FOR PRODUCTION NO. 33:

All documents and things referring or relating to trade or industry shows attended by Applicant.

REQUEST FOR PRODUCTION NO. 34:

Documents and things sufficient to identify the level of sophistication/degree of care of the average consumer of Applicant's Goods.

REQUEST FOR PRODUCTION NO. 35:

Documents sufficient to show the types of stores, restaurants, and other establishments (retail or wholesale) where Applicant's Goods have been, are, or will be sold.

REQUEST FOR PRODUCTION NO. 36:

All documents and things concerning the commercial impression Applicant intends Applicant's Mark and any variation thereof to have.

REQUEST FOR PRODUCTION NO. 37:

All documents that refer or relate to the types, characteristics, geographic markets, classes or types of persons who purchase or obtain Applicant's Goods.

REQUEST FOR PRODUCTION NO. 38:

All documents and things referring or relating to the class or type of consumers to whom Applicant advertises and markets or to whom Applicant plans to advertise and market Applicant's Goods.

REQUEST FOR PRODUCTION NO. 39:

All documents and things referring or relating to consumer recognition of Applicant's Mark as an indication of source for Applicant's Goods.

REQUEST FOR PRODUCTION NO. 40:

All documents and things relating to the circumstances surrounding your first awareness of Opposer, Opposer's Marks, or Opposer's Goods.

REQUEST FOR PRODUCTION NO. 41:

All documents and things relating to any consideration of or reference to Opposer or Opposer's Marks in connection with the design and development of Applicant's Mark.

REQUEST FOR PRODUCTION NO. 42:

All documents and things relating to surveys or polls conducted by you or on your behalf to determine whether any customer or potential customer is or will likely be confused, mistaken or deceived as to the affiliation and/or relationship between Opposer's Marks, on the one hand, and Applicant's Mark on the other hand.

REQUEST FOR PRODUCTION NO. 43:

All documents and things relating to any instances of actual or possible confusion or association, or any reports of such confusion or association, known to you, between (i)

Applicant, Applicant's Goods, or Applicant's Mark, and (ii) Opposer, Opposer's Goods, or Opposer's Marks, including, but not limited to, any inquiries or comments regarding whether Applicant's Goods originate from the same source as, or are affiliated with, Opposer or Opposer's Goods.

REQUEST FOR PRODUCTION NO. 44:

All communications relating to Opposer, Opposer's Marks, or Opposer's Goods, including, but not limited to, any such communications between you and any distributors, retailers, and/or consumers.

REQUEST FOR PRODUCTION NO. 45:

All documents and things relating to any opinions, written or oral, relating to Applicant's Mark, Opposer, Opposer's Goods, and/or Opposer's Marks.

REQUEST FOR PRODUCTION NO. 46:

Documents sufficient to show all marks of which you are aware that are used and/or registered by third-parties that include any of Opposer's Marks or marks that you contend to be similar to any of Opposer's Marks.

REQUEST FOR PRODUCTION NO. 47:

All documents and things relating to any decision to seek or not seek trademark protection for any aspect of Applicant's Mark.

REQUEST FOR PRODUCTION NO. 48:

All documents and things referring or relating to any agreements that concern Applicant's Mark or any variation thereof.

REQUEST FOR PRODUCTION NO. 49:

All documents and things referring or relating to any grant or acquisition of rights in Applicant's Mark through assignment, license or other transfer of any rights to or from Applicant.

REQUEST FOR PRODUCTION NO. 50:

All documents and things referring or relating to any claimed predecessor-in-title or interest to Applicant's Mark.

REQUEST FOR PRODUCTION NO. 51:

All documents and things referring or relating to any objection raised to Applicant's use or registration of Applicant's Mark by any person or entity other than Opposer.

REQUEST FOR PRODUCTION NO. 52:

All documents and things referring or relating to any lawsuits or other formal legal proceedings based on, concerning, or involving Applicant's Mark.

REQUEST FOR PRODUCTION NO. 53:

All documents and things referring or relating to any effort by Applicant to enforce Applicant's Mark, including, but not limited to, any cease and desist letters sent by Applicant relating to Applicant's Mark.

REQUEST FOR PRODUCTION NO. 54:

All documents and things referring or relating to all federal or state trademark registrations, applications or common law marks owned or used by Applicant upon which Applicant may rely for any purpose in this opposition proceeding.

REQUEST FOR PRODUCTION NO. 55:

All documents and things referring or relating to Applicant's policies regarding retention, storage, filing and destruction of documents and things.

REQUEST FOR PRODUCTION NO. 56:

All documents and things upon which you intend to rely in this proceeding.

REQUEST FOR PRODUCTION NO. 57:

All documents and things that support, refute or otherwise relate to any of your affirmative defenses raised in this Opposition.

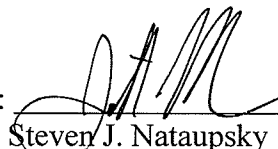
REQUEST FOR PRODUCTION NO. 58:

Documents sufficient to show any marks, other than Applicant's Marks, that are also used in connection with Applicant's Goods.

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: 2-10-15

By: _____


Steven J. Nataupsky
Diane M. Reed
Jonathan A. Menkes
2040 Main Street, Fourteenth Floor
Irvine, CA 92614
(949) 760-0404
efiling@knobbe.com
Attorneys for Opposer,
MONSTER ENERGY COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the **OPPOSER MONSTER ENERGY COMPANY'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS (Nos. 1-58)** has been served on Thomas F. Bergert, Applicant's attorney of record by mailing one copy on February 10, 2015 via First Class mail, postage prepaid to:

Thomas F. Bergert
WILLIAMS MULLEN
321 E. Main Street, Suite 400
Charlottesville, VA 22902

Signature: _____

Name: Francisca C. Leon Guerrero

Date: February 10, 2015

18879807/FLG/091214

TTAB Opposition No. 91217273

Monster Energy Company v. Three Notch'd Brewing Company, LLC

EXHIBIT 2

2. The term “Opposer” shall refer to Monster Energy Company, and any present or former owners, officers, directors, employees, servants, agents, attorneys or other representatives acting on its behalf, and shall include any parent corporation, or wholly-owned or partially-owned subsidiary, predecessor, successor, or affiliate either within the United States or a foreign country.

3. The terms “you” or “your” shall mean Applicant.

4. The term “document” is used in the broadest sense permitted by the FRCP and expressly includes without limitation any tangible thing upon which information is or has been stored, recorded, or communicated and any written, printed, typed, and visually or aurally reproduced material of any kind, whether or not privileged, such as (by way of example and not by way of limitation) correspondence, letters, notes, memoranda, diaries, invoices, purchase orders, records, minutes, bills, contracts, agreements, orders, receipts, price lists, studies, drawings or sketches, telephone messages, films, pictures, photographs, electronic mail, microfilm, magnetic media (including but not limited to hard disks or drives, floppy disks, compact disks, CD-ROMs, DVD-ROMs, and magnetic tapes of any kind) tapes or discs capable of being mechanically read, advertising or promotional literature, operating manuals or instruction bulletins, cables or telegrams, maps, charts, surveys, test data, reports, tape or other recordings, HTML code, and Internet website pages, every copy of every such writing or record where the original is not in the possession, custody, or control of Applicant, and every copy of every such writing or record where such copy is not an identical copy of the original or where such copy contains any commentary that does not appear on the original.


5. The term “and” shall be construed to include “or” and *vice versa*, and shall be the logical equivalent of “and/or,” as necessary in order to bring within the scope of the Interrogatory all responses which might otherwise be construed as outside its scope.

6. The use of the singular form of any word also includes the plural and *vice versa*.

7. The phrases “use in commerce,” “use in United States commerce,” “used in commerce” and “used in United States commerce,” and similar phrases, shall mean and refer to the definition provided under 15 U.S.C. § 1127.

8. The term “person” shall include both natural persons and corporate or other business entities, whether or not in the employ of Applicant, and the acts and knowledge of a person are defined to include the acts and knowledge of that person’s directors, officers, members, employees, representatives, agents and attorneys.

9. The terms “trademark” or “mark” shall include trademarks, service marks, collective marks, certification marks and trade names as defined in 15 U.S.C. § 1127.

10. The term “Applicant’s Mark” shall mean the mark  that is the subject of U.S. Trademark Application Serial Number 85/920112.

11. “Applicant’s Application” shall mean U.S. Trademark Application Serial Number 85/920112.

12. “Notice of Opposition” shall refer to the Notice of Opposition filed in connection with this opposition - Opposition No. 91217273.

13. The term “Applicant’s Goods” shall mean and refer to the goods Applicant offers or sells, has offered or sold, or intends to offer or sell, in connection with Applicant’s Mark, including, but not limited to, Applicant’s goods in International Class 32 identified in connection with Applicant’s Mark, namely, beer.

14. The term “Opposer’s Marks” shall collectively refer to all of Opposer’s marks alleged in Opposer’s Notice of Opposition.

15. The term “Opposer’s Goods” shall mean and refer to all of the goods covered under Opposer’s Marks or as alleged in Opposer’s Notice of Opposition.

GENERAL INSTRUCTIONS

1. All requests contained in the following Interrogatories to identify a person are to be answered by providing sufficient information to enable the undersigned to contact the person by telephone and mail and to serve legal documents on such person. If such a person is a natural person, state his or her:

- a. full name;
- b. current business and residence addresses, including telephone numbers;
- c. present employer, occupation, and position;
- d. a brief description of the job responsibilities of such person; and
- e. a brief description of the responsibilities of such person with the pertinent organization.

If such person is other than a natural person, state:

- a. its full name and designation;
 - b. the legal classification of the entity (e.g., corporation, partnership, etc.), giving the state of incorporation or business registration where appropriate;
 - c. the principal place of business;
 - d. the current or last known address and telephone number of the organization;
- and

- e. any other information reasonably necessary to permit efficient contact with the organization.

2. All requests contained in the following Interrogatories to identify a document means to provide a description in terms sufficient that the document can be readily and unambiguously sought in a Request for Production of Documents under Federal Rules of Civil Procedure 34 and shall include:

- a. a statement of the general nature and contents of the document (e.g., whether the document is a letter, memorandum, notebook, pamphlet, report, email, etc.);
- b. the date;
- c. the author;
- d. all addresses and copy recipients; and
- e. the person who has custody of the document.

In lieu of such identification, Opposer will accept a clear and legible copy of the document at the time Applicant answers this set of Interrogatories with a correlation of the produced document to the Interrogatory number.

3. The term “date” means the exact day, month, and year, if ascertainable and, if not, the best approximation thereof.

4. Applicant’s obligation to respond to these Interrogatories is continuing, and the responses to the following Interrogatories are to be promptly supplemented to include subsequently acquired information in accordance with the requirements of Rule 26(e) of the Federal Rules of Civil Procedure.

INTERROGATORIES

INTERROGATORY NO. 1:

Identify each person involved with the design, development, selection or approval of Applicant's Mark, and for each person so identified, describe their role in such design, development, selection, or approval.

INTERROGATORY NO. 2:

Describe in detail any use by Applicant of any variation of Applicant's Mark in connection with Applicant's Goods.

INTERROGATORY NO. 3:

Describe in detail the circumstances surrounding Applicant's selection or adoption of Applicant's Mark.

INTERROGATORY NO. 4:

Describe in detail all goods ever offered for sale or sold by Applicant in connection with Applicant's Mark in the U.S.

INTERROGATORY NO. 5:

For each of Applicant's Goods, identify the date the good was first offered for sale or sold in connection with Applicant's Mark.

INTERROGATORY NO. 6:

Identify each state where Applicant's Goods have been or are currently sold in connection with Applicant's Mark and state the date on which sales began in each state.

INTERROGATORY NO. 7:

Describe in detail the circumstances surrounding when Applicant ceased using Applicant's Mark in connection with any of Applicant's Goods for any period of time.

INTERROGATORY NO. 8:

Describe in detail Applicant's plans to expand the products or services under which Applicant's Mark will be used.

INTERROGATORY NO. 9:

For each product offered in connection with Applicant's Mark, state the average wholesale and retail price of each product.

INTERROGATORY NO. 10:

State your net and gross sales (in units and dollars) and net and gross profits, on a monthly basis, for each of Applicant's Goods since the date of first sale of each product.

INTERROGATORY NO. 11:

Describe in detail the manner in which you have advertised and/or promoted Applicant's Goods, including identifying the publications, radio stations, television stations, websites, advertising programs, or other media channels through which you have promoted the products.

INTERROGATORY NO. 12:

Identify all trade shows or promotional events that Applicant has attended or plans to attend to promote Applicant's Goods under Applicant's Mark or any variation thereof, identifying the name, date, and location of each trade show or event.

INTERROGATORY NO. 13:

Identify, on an annual basis, the dollar amount Applicant spent on advertising Applicant's Mark from the date of first use to the present.

INTERROGATORY NO. 14:

Describe the trade channels, such as retail stores and other outlets, through which Applicant's Goods have been sold, are currently being sold, or will be sold.

INTERROGATORY NO. 15:

Describe in detail the level of sophistication/degree of care of the average consumer of Applicant's Goods.

INTERROGATORY NO. 16:

Identify the customer base for Applicant's Goods, including identifying and describing the type of individual and demographic to which you market or aim to market the products.

INTERROGATORY NO. 17:

Describe in detail the circumstances under which Applicant first became aware of Opposer's Marks or any variation thereof.

INTERROGATORY NO. 18:

Describe in detail how and in what way any of Opposer's Marks or Opposer's Goods were considered or referenced during the selection, design, development, or clearance of Applicant's Mark.

INTERROGATORY NO. 19:

Identify any opinions, written or oral, you have received relating to Opposer's Goods and/or Opposer's Marks, including, but not limited to, identifying the person(s) who sought the opinion, the date the opinion was sought, the date the opinion was received, the person(s) who provided the opinion, the person(s) who received the opinion, and the subject matter of the opinion.

INTERROGATORY NO. 20:

Identify and describe any inquiries or comments you have received from third-parties relating to Opposer or Opposer's Goods, including, but not limited to, stating who made the inquiry/comment, who received the inquiry/comment, when the inquiry/comment was received,

the content of the inquiry/comment, and any steps taken by you after receiving the inquiry/comment.

INTERROGATORY NO. 21:

Describe all third-party uses of Opposer's Marks or marks that you contend are similar to Opposer's Marks, including identifying the third-party and describing the goods or services in connection with which the design was used by the third-party.

INTERROGATORY NO. 22:

State the complete factual and legal basis for your affirmative defense that "Opposer fails to state a claim upon which relief can be granted."

INTERROGATORY NO. 23:

State the complete factual and legal basis for your affirmative defense that "[t]here is no likelihood of confusion, mistake or deception between Applicant's Mark and Opposer's alleged Claw Icon marks because, inter alia, Applicant's Mark and Opposer's Alleged Claw Icon marks are not confusingly similar."

INTERROGATORY NO. 24:

State the complete factual and legal basis for your affirmative defense that "[t]here is no likelihood of confusion, mistake or deception between Applicant's Mark and Opposer's alleged Claw Icon marks because, inter alia, any rights Opposer may have in the pleaded marks are weak and must be narrowly circumscribed."

INTERROGATORY NO. 25:

State the complete factual and legal basis for any other affirmative defense upon which you intend to rely other than those set forth in Your responses to Interrogatory Nos. 22-24 above.

INTERROGATORY NO. 26:

Identify the witnesses who Applicant intends to call to testify on its behalf in this Opposition Proceeding and state the subject matter about which each witness is expected to testify.

INTERROGATORY NO. 27:

Identify all searches (including trademark searches), research, surveys, studies, polls or investigations conducted by Applicant (including Applicant's agents), concerning Applicant's Mark.

INTERROGATORY NO. 28:

Describe any research (including, but not limited to, surveys, polls, market research investigations, analyses, studies, or searches) regarding Applicant's Goods, including, but not limited to, stating the person(s) who authorized the research, when the research was conducted, the person(s) who conducted the research, the reason the research was conducted, the results of the research, and identifying all documents relating to the research.

INTERROGATORY NO. 29:

State the complete factual and legal basis for any denials of any of Opposer's First Set of Requests for Admissions.

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: 2-10-15

By: 

Steven J. Nataupsky

Diane M. Reed

Jonathan A. Menkes

2040 Main Street

Fourteenth Floor

Irvine, CA 92614

(949) 760-0404

Attorneys for Opposer,

Monster Energy Company

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the **OPPOSER MONSTER ENERGY COMPANY'S FIRST SET OF INTERROGATORIES (Nos. 1-29)** has been served on Thomas F. Bergert, Applicant's attorney of record by mailing one copy on February 10, 2015 via First Class mail, postage prepaid to:

Thomas F. Bergert
WILLIAMS MULLEN
321 E. Main Street, Suite 400
Charlottesville, VA 22902

Signature: 

Name: Francisca C. Leon Guerrero

Date: February 10, 2015

18879811/flg/091214

TTAB Opposition No. 91217273

Monster Energy Company v. Three Notch'd Brewing Company, LLC

EXHIBIT 3

MONSTER ENERGY COMPANY,)	
)	
Opposer,)	
)	Opposition No. 91217273
v.)	
)	Serial No. 85/920,112
THREE NOTCH'D BREWING COMPANY, LLC,)	
)	
Applicant.)	
)	

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Applicant Three Notch'd Brewing Company, LLC ("Applicant") hereby responds to Opposer Monster Energy Company's ("Opposer") First Set of Document Requests (Request Nos. 1-58) ("Requests") as follows.

1. Applicant objects to the definition of “Applicant” as overly broad and as seeking information not in the possession, custody, or control of Applicant with respect to “any . . . former owner, officer, director, employee, servant, agent, attorney or other representative acting on behalf of it . . .” and “any related entity . . . or affiliate.”

2. Applicant objects to the definition of “person” as overly broad with respect to “and the acts and knowledge of a person are defined to include the acts and knowledge of that person’s directors, officers, members, employees, representatives, agents and attorneys.”

3. Applicant objects to the definition of “Applicant’s Goods” as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably

calculated to lead to the discovery of admissible evidence with respect to “the goods Applicant offers or sells, has offered or sold, or intends to offer or sell, in connection with Applicant’s Mark,” to the extent it purports to include goods not recited in U.S. Trademark Application Serial No. 85/920,112.

4. Applicant objects to the definition of “Opposer’s Goods” as vague and ambiguous with respect to “all of the goods covered under Opposer’s Marks,” to the extent it purports to include goods not referenced in Opposer’s Notice of Opposition.

OBJECTIONS TO INSTRUCTIONS

1. Applicant objects to the Instructions to the extent they purport to impose obligations beyond those required by applicable rules, including the Federal Rules of Civil Procedure and the Trademark Trial and Appeal Board Manual of Procedure (TBMP). Applicant will respond to the Requests in accordance with applicable rules.

2. Applicant objects to the Instructions to the extent that they seek to compel production of confidential, proprietary, or trade secret information. Applicant will only provide such information, to the extent it exists, in accordance with a protective order entered by the parties.

OBJECTIONS AND RESPONSES TO DOCUMENT REQUESTS

REQUEST NO. 1:

All documents and things referring or relating to the origin, conception, derivation, selection and/or adoption of Applicant’s Mark, including, but not limited to, how Applicant created, conceived, selected, cleared and acquired Applicant’s Mark, whether in the United States or abroad.

OBJECTIONS AND RESPONSE TO REQUEST NO. 1:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the

possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to “or abroad.”

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant’s possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 2:

All documents and things referring or relating to all variations and versions of Applicant’s Mark, whether final or not and whether used or not, which were considered or developed for Applicant’s Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 2:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to “variations or versions . . . whether final or not and whether used or not” and “which were considered” insofar as it purports to seek documents and things that pertain to marks other than Applicant’s Mark.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents or things depicting Applicant’s Mark.

REQUEST NO. 3:

All documents and things relating to the past use, present use, or plans for future use of any colors in connection with Applicant's Mark.

OBJECTIONS AND RESPONSE TO REQUEST NO. 3:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents and things," including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to "plans for future use." Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence, with respect to "any colors," insofar as color is not claimed in U.S. Trademark Application Serial No. 85/920,112.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents or things depicting Applicant's Mark.

REQUEST NO. 4:

All documents and things referring or relating to the reasons Applicant selected Applicant's Mark for the goods sold or offered for sale in connection with Applicant's Mark.

OBJECTIONS AND RESPONSE TO REQUEST NO. 4:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents and things," including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad with respect to "for the goods sold or offered for sale in connection with Applicant's

Mark,” insofar as it purports to seek documents and things that pertain to goods other than the goods recited in U.S. Trademark Application Serial No. 85/920,112, namely beer.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant’s possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 5:

All documents and things sufficient to show the person or persons who assisted with or otherwise developed and/or created Applicant’s Mark.

OBJECTIONS AND RESPONSE TO REQUEST NO. 5:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as vague and ambiguous with respect to “[a]ll documents and things . . . sufficient to show.” Applicant shall interpret the Request as seeking “documents and things . . . sufficient to show.” Applicant further objects to this Request as vague and ambiguous with respect to “assisted with.”

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant’s possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 6:

All documents and things referring or relating to any searches (including trademark searches), research, inquiries or investigations conducted by you or on your behalf relating to Applicant’s Mark.

OBJECTIONS AND RESPONSE TO REQUEST NO. 6:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request and vague and ambiguous with respect to “searches . . . research, inquiries or investigations . . . relating to Applicant’s Mark.” Applicant further objects to this Request insofar as it seeks documents and things that are protected by the attorney-client privilege and/or any other applicable privilege or immunity.

Subject to and without waiving the foregoing objections, Applicant responds that it is not aware of any non-privileged responsive documents in its possession, custody, or control.

REQUEST NO. 7:

All documents and things referring or relating to any searches (including trademark searches), research, inquiries or investigations conducted by you or on your behalf relating to Opposer’s Marks.

OBJECTIONS AND RESPONSE TO REQUEST NO. 7:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request and vague and ambiguous with respect to “searches . . . research, inquiries or investigations . . . relating to Opposer’s Mark.”

Subject to and without waiving the foregoing objections, Applicant responds that it is not aware of any non-privileged responsive documents in its possession, custody, or control.

REQUEST NO. 8:

All documents referring or relating to plans, including but not limited to, marketing plans, advertising plans, and business forecasts, by Applicant to adopt or use additional marks that

include the following portion of Applicant's Mark:



OBJECTIONS AND RESPONSE TO REQUEST NO. 8:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence, with respect to “plans, including . . . marketing plans, advertising plans, and business forecasts.” Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence, with respect to “additional marks” and with respect to a “portion” of Applicant’s Mark, insofar as it purports to seek documents and things that pertain to marks other than Applicant’s Mark, or to Applicant’s Mark other than in its entirety.

REQUEST NO. 9:

All documents and things identified in your Initial Disclosures.

OBJECTIONS AND RESPONSE TO REQUEST NO. 9:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad and not in compliance with Fed. R. Civ. P. 34(b), which requires that a request specify the

items to be produced or inspected, either by individual item or category, and describe with reasonable particularity each item and category.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant's possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 10:

All documents referred to, relied upon and/or reviewed by you in connection with your response to Opposer's Interrogatories.

OBJECTIONS AND RESPONSE TO REQUEST NO. 10:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents," including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request with respect to "reviewed," insofar as it seeks documents and things that are protected by the attorney-client privilege and/or any other applicable privilege or immunity. Applicant further objects to this Request as overly broad and not in compliance with Fed. R. Civ. P. 34(b), which requires that a request specify the items to be produced or inspected, either by individual item or category, and describe with reasonable particularity each item and category.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant's possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 11:

All documents and things identified or relied upon in your responses to Opposer's Requests for Admissions.

OBJECTIONS AND RESPONSE TO REQUEST NO. 11:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad and not in compliance with Fed. R. Civ. P. 34(b), which requires that a request specify the items to be produced or inspected, either by individual item or category, and describe with reasonable particularity each item and category.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant’s possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 12:

All documents and things referring or relating to the date of first sale of each good bearing Applicant’s Mark.

OBJECTIONS AND RESPONSE TO REQUEST NO. 12:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to “each good,” insofar as it purports to seek documents and things that pertain to goods other than the goods recited in U.S. Trademark Application Serial No. 85/920,112, namely beer.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this

Request, to the extent any exist, are in Applicant's possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 13:

All documents and things referring or relating to the first commercial use of Applicant's Mark, including any samples, advertisements, marketing plans and invoices.

OBJECTIONS AND RESPONSE TO REQUEST NO. 13:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents and things," including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to "marketing plans and invoices."

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant's possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 14:

Documents and things sufficient to identify each person involved in deciding when and how Applicant's Mark would be used in commerce.

OBJECTIONS AND RESPONSE TO REQUEST NO. 14:

Applicant objects to this Request as vague and ambiguous with respect to "involved." Applicant further objects to this Request as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant's possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 15:

Documents and things sufficient to identify all goods that have been sold, are currently being sold, or will be sold in connection with Applicant's Mark.

OBJECTIONS AND RESPONSE TO REQUEST NO. 15:

Applicant objects to this Request as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to "goods that . . . will be sold." Applicant further objects to this Request as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to "all goods that have been sold [or] are currently being sold," insofar as it purports to seek documents and things that pertain to goods other than the goods recited in U.S. Trademark Application Serial No. 85/920,112, namely beer.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents depicting Applicant's beer.

REQUEST NO. 16:

Documents and things sufficient to demonstrate each state that Applicant has shipped or sold Applicant's Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 16:

Applicant objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence, with respect to “each state that Applicant has shipped or sold Applicant’s Goods.”

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant’s possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 17:

Documents and things sufficient to show your continuous use of Applicant’s Mark since the date of first use to the present.

OBJECTIONS AND RESPONSE TO REQUEST NO. 17:

Applicant objects to this Request as overly broad, unduly burdensome, not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence, with respect to “sufficient to show your continuous use,” insofar as Opposer has not alleged that Applicant has abandoned or ceased use of Applicant’s Mark.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents showing Applicant’s use of Applicant’s Mark with beer.

REQUEST NO. 18:

Representative samples of each product, label, tag, packaging, container, sign, brochure, advertisement or catalog showing Applicant’s past use, current use, and intended use of Applicant’s Mark, including products with variations of Applicant’s Mark.

OBJECTIONS AND RESPONSE TO REQUEST NO. 18:

Applicant objects to this Request as overly broad, unduly burdensome, vague, ambiguous, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to “each product,” “Applicant’s . . . intended use,” and “products with variations of Applicant’s Mark.”

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents depicting Applicant’s use of Applicant’s Mark in connection with Applicant’s beer and advertisements for Applicant’s beer.

REQUEST NO. 19:

Documents sufficient to show each product or service offered or sold by you or that have been licensed and/or distributed by Applicant or any other person or entity authorized by Applicant.

OBJECTIONS AND RESPONSE TO REQUEST NO. 19:

Applicant objects to this Request as overly broad, unduly burdensome, vague, ambiguous, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to “each product or service offered or sold by you or that have been licensed and/or distributed.”

REQUEST NO. 20:

All marketing and business plans relating to Applicant’s Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 20:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll . . . plans,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 21:

All documents and things concerning your efforts and/or intent to expand Applicant’s Mark to different product lines or geographical areas.

OBJECTIONS AND RESPONSE TO REQUEST NO. 21:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 22:

Documents sufficient to show, on a monthly basis, your total net and gross sales (both in units and dollars) and total net and gross profits for each of Applicant’s Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 22:

Applicant objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Request as overly broad with respect to “on a monthly basis,” including because it seeks documents and things that may not be in the possession, custody, or control of Applicant.

REQUEST NO. 23:

Documents sufficient to show, on a monthly basis, your total net and gross sales (both in units and dollars) for each of Applicant's Goods by geographic area.

OBJECTIONS AND RESPONSE TO REQUEST NO. 23:

Applicant objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Request as overly broad with respect to "on a monthly basis," including because it seeks documents and things that may not be in the possession, custody, or control of Applicant.

REQUEST NO. 24:

Sales summaries or sales reports for Applicant's Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 24:

Applicant objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 25:

Documents sufficient to show the prices charged for Applicant's Goods, including, but not limited to, price lists for the products.

OBJECTIONS AND RESPONSE TO REQUEST NO. 25:

Applicant objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 26:

All documents and things referring or relating to any and all advertising agencies, public relations agencies, marketing firms, market research agencies or other person(s) which Applicant

has used, participated with or cooperated with in advertising, marketing or promoting any of Applicant's Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 26:

Applicant objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 27:

Representative samples of documents and things referring or relating to advertising, marketing and/or promotion of Applicant's Mark or of Applicant's Goods, including, but not limited to: media in which Applicant's Mark appears, labels, boxes, packaging, stickers, advertisements, brochures, flyers, pamphlets, promotional materials, magazines, articles, billboards, radio advertisements, television advertisements, Internet advertisements or other printed or electronic publications, websites or domain names.

OBJECTIONS AND RESPONSE TO REQUEST NO. 27:

Applicant objects to this Request as overly broad with respect to "promotion of Applicant's Mark or of Applicant's Goods," to the extent it purports to seek documents and things that pertain to marks other than Applicant's Mark or to goods other than the goods recited in U.S. Trademark Application Serial No. 85/920,112, namely beer.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant's possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 28:

All press releases issued by or on behalf of Applicant that refer to Applicant's Mark.

OBJECTIONS AND RESPONSE TO REQUEST NO. 28:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll press releases,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad with respect to “that refer to Applicant’s Mark,” to the extent it purports to seek documents and things that pertain to Applicant’s use of Applicant’s Mark with goods other than the goods recited in U.S. Trademark Application Serial No. 85/920,112, namely beer.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant’s possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 29:

All documents and things reflecting any mention in the press of Applicant’s Mark, including any Internet web pages, magazines, newspapers or other printed publications that contain an article or other story relating to goods sold or offered for sale in connection with Applicant’s Mark.

OBJECTIONS AND RESPONSE TO REQUEST NO. 29:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad with respect to “any mention . . . of Applicant’s Mark” and “goods sold or offered for sale in connection with Applicant’s Mark,” to the extent it purports to seek documents and things that pertain to use of Applicant’s Mark with goods other than the goods recited in U.S. Trademark Application Serial No. 85/920,112, namely beer.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant's possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 30:

All documents and things referring or relating to printed publications Applicant has advertised in, plans to advertise in or intends to advertise Applicant's Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 30:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents and things," including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to "plans to advertise" and "intends to advertise."

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents showing Applicant's use of Applicant's Mark in connection with the advertisement of Applicant's beer.

REQUEST NO. 31:

All documents and things referring or relating to the channels of trade through which Applicant sells, offers for sale, or intends to sell Applicant's Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 31:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as vague and ambiguous with respect to “channels of trade.” Applicant further objects to this Request as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to “intends to sell.”

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant’s possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 32:

All documents and things referring or relating to any expansion or alteration of the channels of trade and/or plans to alter or expand the channels of trade through which Applicant sells or offers for sale any of Applicant’s Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 32:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to “expansion or alteration of the channels of trade and/or plans to alter or expand the channels of trade.”

Subject to and without waiving the foregoing objections, Applicant responds that it is not aware of any non-privileged responsive documents in its possession, custody, or control.

REQUEST NO. 33:

All documents and things referring or relating to trade or industry shows attended by Applicant.

OBJECTIONS AND RESPONSE TO REQUEST NO. 33:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant.

Subject to and without waiving the foregoing objections, Applicant responds that it is not aware of any non-privileged responsive documents in its possession, custody, or control.

REQUEST NO. 34:

Documents and things sufficient to identify the level of sophistication/degree of care of the average consumer of Applicant’s Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 34:

Applicant objects to this Request as vague, ambiguous, and calling for a legal conclusion with respect to “the level of sophistication/degree of care of the average consumer.”

REQUEST NO. 35:

Documents sufficient to show the types of stores, restaurants, and other establishments (retail or wholesale) where Applicant’s Goods have been, are, or will be sold.

OBJECTIONS AND RESPONSE TO REQUEST NO. 35:

Applicant objects to this Request as vague and ambiguous with respect to “types.”

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant’s possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 36:

All documents and things concerning the commercial impression Applicant intends Applicant's Mark and any variation thereof to have.

OBJECTIONS AND RESPONSE TO REQUEST NO. 36:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents and things," including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as vague and ambiguous with respect to "the commercial impression Applicant intends Applicant's Mark . . . to have." Applicant further objects to this Request as overly broad with respect to "any variation," to the extent it purports to seek documents and things that pertain to marks other than Applicant's Mark.

REQUEST NO. 37:

All documents that refer or relate to the types, characteristics, geographic markets, classes or types of persons who purchase or obtain Applicant's Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 37:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents," including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as vague and ambiguous with respect to "the types, characteristics, geographic markets, classes or types of persons who purchase or obtain Applicant's Goods."

REQUEST NO. 38:

All documents and things referring or relating to the class or type of consumers to whom Applicant advertises and markets or to whom Applicant plans to advertise and market Applicant's Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 38:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as vague and ambiguous with respect to “the class or type of consumers to whom Applicant advertises and markets.” Applicant further objects to this Request as overly broad with respect to “plans to advertise and market.”

REQUEST NO. 39:

All documents and things referring or relating to consumer recognition of Applicant’s Mark as an indication of source for Applicant’s Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 39:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 40:

All documents and things relating to the circumstances surrounding your first awareness of Opposer, Opposer’s Marks, or Opposer’s Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 40:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as vague and ambiguous with respect to “circumstances surrounding.”

Subject to and without waiving the foregoing objections, Applicant responds that it is not aware of any non-privileged responsive documents in its possession, custody, or control.

REQUEST NO. 41:

All documents and things relating to any consideration of or reference to Opposer or Opposer's Marks in connection with the design and development of Applicant's Mark.

OBJECTIONS AND RESPONSE TO REQUEST NO. 41:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents and things," including documents and things that may not be in the possession, custody, or control of Applicant.

Subject to and without waiving the foregoing objections, Applicant responds that it is not aware of any non-privileged responsive documents in its possession, custody, or control.

REQUEST NO. 42:

All documents and things relating to surveys or polls conducted by you or on your behalf to determine whether any customer or potential customer is or will likely be confused, mistaken or deceived as to the affiliation and/or relationship between Opposer's Marks, on the one hand, and Applicant's Mark on the other hand.

OBJECTIONS AND RESPONSE TO REQUEST NO. 42:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents and things," including documents and things that may not be in the possession, custody, or control of Applicant.

Subject to and without waiving the foregoing objections, Applicant responds that it is not aware of any non-privileged responsive documents in its possession, custody, or control.

REQUEST NO. 43:

All documents and things relating to any instances of actual or possible confusion or association, or any reports of such confusion or association, known to you, between (i) Applicant, Applicant's Goods, or Applicant's Mark, and (ii) Opposer, Opposer's Goods, or Opposer's Marks, including, but not limited to, any inquiries or comments regarding whether

Applicant's Goods originate from the same source as, or are affiliated with, Opposer or Opposer's Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 43:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents and things," including documents and things that may not be in the possession, custody, or control of Applicant.

Subject to and without waiving the foregoing objections, Applicant responds that it is not aware of any non-privileged responsive documents in its possession, custody, or control.

REQUEST NO. 44:

All communications relating to Opposer, Opposer's Marks, or Opposer's Goods, including, but not limited to, any such communications between you and any distributors, retailers, and/or consumers.

OBJECTIONS AND RESPONSE TO REQUEST NO. 44:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll communications," including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request insofar as it seeks documents and things that are protected by the attorney-client privilege and/or any other applicable privilege or immunity.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant's possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 45:

All documents and things relating to any opinions, written or oral, relating to Applicant's Mark, Opposer, Opposer's Goods, and/or Opposer's Marks.

OBJECTIONS AND RESPONSE TO REQUEST NO. 45:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request insofar as it seeks documents and things that are protected by the attorney-client privilege and/or any other applicable privilege or immunity. Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, Applicant responds that it is not aware of any non-privileged responsive documents in its possession, custody, or control.

REQUEST NO. 46:

Documents sufficient to show all marks of which you are aware that are used and/or registered by third-parties that include any of Opposer’s Marks or marks that you contend to be similar to any of Opposer’s Marks.

OBJECTIONS AND RESPONSE TO REQUEST NO. 46:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks documents showing “[a]ll marks of which [Applicant is] aware,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as vague and ambiguous with respect to “similar to.”

Subject to and without waiving the foregoing objections, Applicant responds that it is not aware of any non-privileged responsive documents in its possession, custody, or control.

REQUEST NO. 47:

All documents and things relating to any decision to seek or not seek trademark protection for any aspect of Applicant’s Mark.

OBJECTIONS AND RESPONSE TO REQUEST NO. 47:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request insofar as it seeks documents and things that are protected by the attorney-client privilege and/or any other applicable privilege or immunity. Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, Applicant responds that it is not aware of any non-privileged responsive documents in its possession, custody, or control.

REQUEST NO. 48:

All documents and things referring or relating to any agreements that concern Applicant’s Mark or any variation thereof

OBJECTIONS AND RESPONSE TO REQUEST NO. 48:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad with respect to “any variation thereof,” insofar as it purports to seek documents and things that pertain to marks other than Applicant’s Mark. Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 49:

All documents and things referring or relating to any grant or acquisition of rights in Applicant’s Mark through assignment, license or other transfer of any rights to or from Applicant.

OBJECTIONS AND RESPONSE TO REQUEST NO. 49:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 50:

All documents and things referring or relating to any claimed predecessor-in-title or interest to Applicant’s Mark.

OBJECTIONS AND RESPONSE TO REQUEST NO. 50:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 51:

All documents and things referring or relating to any objection raised to Applicant’s use or registration of Applicant’s Mark by any person or entity other than Opposer.

OBJECTIONS AND RESPONSE TO REQUEST NO. 51:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 52:

All documents and things referring or relating to any lawsuits or other formal legal proceedings based on, concerning, or involving Applicant's Mark.

OBJECTIONS AND RESPONSE TO REQUEST NO. 52:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents and things," including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 53:

All documents and things referring or relating to any effort by Applicant to enforce Applicant's Mark, including, but not limited to, any cease and desist letters sent by Applicant relating to Applicant's Mark.

OBJECTIONS AND RESPONSE TO REQUEST NO. 53:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents and things," including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 54:

All documents and things referring or relating to all federal or state trademark registrations, applications or common law marks owned or used by Applicant upon which Applicant may rely for any purpose in this opposition proceeding.

OBJECTIONS AND RESPONSE TO REQUEST NO. 54:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents and things," including documents and things that may not be in the

possession, custody, or control of Applicant. Applicant further objects to this Request as premature insofar as it seeks disclosure of documents or things on which Applicant may rely while discovery and investigation is ongoing. Applicant further objects to this Request as overly broad and not in compliance with Fed. R. Civ. P. 34(b), which requires that a request specify the items to be produced or inspected, either by individual item or category, and describe with reasonable particularity each item and category.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant's possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 55:

All documents and things referring or relating to Applicant's policies regarding retention, storage, filing and destruction of documents and things.

OBJECTIONS AND RESPONSE TO REQUEST NO. 55:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks "[a]ll documents and things," including documents and things that may not be in the possession, custody, or control of Applicant.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant's possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 56:

All documents and things upon which you intend to rely in this proceeding.

OBJECTIONS AND RESPONSE TO REQUEST NO. 56:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as premature insofar as it seeks disclosure of documents or things on which Applicant may rely while discovery and investigation is ongoing. Applicant further objects to this Request as overly broad and not in compliance with Fed. R. Civ. P. 34(b), which requires that a request specify the items to be produced or inspected, either by individual item or category, and describe with reasonable particularity each item and category.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant’s possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 57:

All documents and things that support, refute or otherwise relate to any of your affirmative defenses raised in this Opposition.

OBJECTIONS AND RESPONSE TO REQUEST NO. 57:

Applicant objects to this Request as overly broad and unduly burdensome insofar as it seeks “[a]ll documents and things,” including documents and things that may not be in the possession, custody, or control of Applicant. Applicant further objects to this Request as overly broad and not in compliance with Fed. R. Civ. P. 34(b), which requires that a request specify the items to be produced or inspected, either by individual item or category, and describe with reasonable particularity each item and category. Applicant further objects to this Request as

overly broad and an abuse of the discovery process, inasmuch as it purports to ask Applicant to plead and prove its entire case, and to marshal all evidence, in response to one written request.

Subject to and without waiving the foregoing objections, Applicant responds that it has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant's possession, custody, or control, and are not privileged or otherwise immune from discovery.

REQUEST NO. 58:

Documents sufficient to show any marks, other than Applicant's Marks, that are also used in connection with Applicant's Goods.

OBJECTIONS AND RESPONSE TO REQUEST NO. 58:

Applicant further objects to this Request as overly broad, unduly burdensome, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence.

THREE NOTCH'D BREWING COMPANY, LLC,
Applicant

Date: March 17, 2015

By: / Robert C. Van Arnam /
Robert C. Van Arnam, Esquire
Williams Mullen
301 Fayetteville Street, Suite 1700
Raleigh, NC 27601
Telephone: (919) 981-4000
Facsimile: (919) 981-4300
Email: rvanarnam@williamsmullen.com

Thomas F. Bergert, Esquire
Williams Mullen
321 East Main St., Suite 400
Charlottesville, Virginia 22902-3200
Telephone: (434) 951-5700
Facsimile: (434) 817-0977
Email: tbergert@williamsmullen.com

Counsel for Applicant

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 2015, the foregoing APPLICANT'S OBJECTIONS AND RESPONSES TO OPPOSER'S FIRST SET OF DOCUMENT REQUESTS has been served on Opposer, Monster Energy Company, by mailing a true and correct copy of the same by first class mail, postage prepaid, to:

Stephen J. Nataupsky
Diane M. Reed
Jonathan A. Menkes
Knobbe, Martens, Olson & Bear, LLP
2040 Main Street, Fourteenth Floor
Irvine, CA 92614

/ Robert C. Van Arnam /
Robert C. Van Arnam, Esquire
Williams Mullen
301 Fayetteville Street, Suite 1700
Raleigh, NC 27601
Telephone: (919) 981-4000
Facsimile: (919) 981-4300
Email: rvanarnam@williamsmullen.com

Thomas F. Bergert, Esquire
Williams Mullen
321 East Main St., Suite 400
Charlottesville, Virginia 22902-3200
Telephone: (434) 951-5700
Facsimile: (434) 817-0977
Email: tbergert@williamsmullen.com

Counsel for Applicant

EXHIBIT 4

offers or sells, has offered or sold, or intends to offer or sell, in connection with Applicant's Mark," to the extent it purports to include goods not recited in U.S. Trademark Application Serial No. 85/920,112.

4. Applicant objects to the definition of "Opposer's Goods" as vague and ambiguous with respect to "all of the goods covered under Opposer's Marks," to the extent it purports to include goods not referenced in Opposer's Notice of Opposition.

OBJECTIONS TO INSTRUCTIONS

1. Applicant objects to the Instructions to the extent they purport to impose obligations beyond those required by applicable rules, including the Federal Rules of Civil Procedure and the Trademark Trial and Appeal Board Manual of Procedure (TBMP). Applicant will respond to the Interrogatories in accordance with applicable rules.

2. Applicant objects to the Instructions to the extent that they seek to compel production of confidential, proprietary, or trade secret information. Applicant will only provide such information, to the extent it exists, in accordance with a protective order entered by the parties.

3. Applicant objects to Instructions, including without limitation Instruction Nos. 1 and 2, as overly broad and unduly burdensome to the extent they require Applicant to supply information and/or documents and things that are not in Applicant's possession, custody, or control, or seek to compel Applicant to generate or create information and/or documents and things that do not already exist or are not maintained by Applicant in the ordinary course of business. Applicant will respond to the Interrogatories in accordance with applicable rules.

OBJECTIONS AND RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

Identify each person involved with the design, development, selection or approval of Applicant's Mark, and for each person so identified, describe their role in such design, development, selection, or approval.

RESPONSE TO INTERROGATORY NO. 1:

Applicant objects to this Interrogatory as overly broad, vague, and ambiguous with respect to "involved with."

Subject to and without waiving the foregoing objections, Applicant responds and identifies the following:

- a) **George Kastendike, Chairman, CEO, and Founder, Three Notch'd Brewing Company, LLC.** Mr. Kastendike was involved in the design, development, selection, and approval of Applicant's Mark, as CEO and Founder of Applicant. Mr. Kastendike should only be contacted through counsel for Applicant.
- b) **Scott Roth, President and COO, Three Notch'd Brewing Company, LLC.** Mr. Roth was involved in the selection and approval of Applicant's Mark, as President and COO of Applicant. Mr. Roth should only be contacted through counsel for Applicant.
- c) **Paul Dierkes (paul@okayyellow.com) and Joel Artz (joel@okayyellow.com), Okay Yellow Design Lab.** Messrs. Dierkes and Artz were involved in the design and development of Applicant's Mark.

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 2:

Describe in detail any use by Applicant of any variation of Applicant's Mark in connection with Applicant's Goods.

RESPONSE TO INTERROGATORY NO. 2:

Applicant objects to this Interrogatory as vague and ambiguous, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to "any variation of Applicant's Mark," insofar as it seeks information pertaining to marks other than Applicant's Mark, or to Applicant's Mark other than in its entirety.

Subject to and without waiving the foregoing objections, Applicant responds and states that it uses Applicant's Mark in connection with the promotion and sale of beer, and that representative samples of such use will be produced in response to Opposer's First Set of Document Requests.

INTERROGATORY NO. 3:

Describe in detail the circumstances surrounding Applicant's selection or adoption of Applicant's Mark.

RESPONSE TO INTERROGATORY NO. 3:

Applicant objects to this Interrogatory as overly broad, vague, and ambiguous with respect to "circumstances surrounding."

Subject to and without waiving the foregoing objections, Applicant responds as follows: Applicant's Mark is a reference to the Three Notch'd Road, a colonial-era road running east and west through central Virginia that was made famous by Jack Jouett's midnight ride to Charlottesville, Virginia in June of 1781 to warn then-Governor Thomas Jefferson and his state legislators that the British cavalry were coming to capture them. The road is believed to have

taken its name from a distinctive marking of three notches burnt or axed into trees to blaze the trail. Applicant's Mark similarly features three notches and takes its name from that of the original trail, which runs less than a quarter mile from the location of Applicant's brewery.

INTERROGATORY NO. 4:

Describe in detail all goods ever offered for sale or sold by Applicant in connection with Applicant's Mark in the U.S.

RESPONSE TO INTERROGATORY NO. 4:

Applicant objects to this Interrogatory as overly broad with respect to "all goods ever," insofar as it is not limited to the goods recited in U.S. Trademark Application Serial No. 85/920,112.

Subject to and without waiving the foregoing objections, Applicant responds as follows:
beer; apparel; glasses; growlers.

INTERROGATORY NO. 5:

For each of Applicant's Goods, identify the date the good was first offered for sale or sold in connection with Applicant's Mark.

RESPONSE TO INTERROGATORY NO. 5:

Applicant objects to this Interrogatory as overly broad with respect to "each of Applicant's Goods," to the extent it purports to seek information regarding goods not recited in U.S. Trademark Application Serial No. 85/920,112.

Subject to and without waiving the foregoing objections, Applicant responds and states that it has used Applicant's Mark in connection with the sale of beer since at least as early as August 29, 2013.

INTERROGATORY NO. 6:

Identify each state where Applicant's Goods have been or are currently sold in connection with Applicant's Mark and state the date on which sales began in each state.

RESPONSE TO INTERROGATORY NO. 6:

Applicant objects to this Interrogatory as consisting of multiple discrete sub-parts. Applicant further objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, Applicant responds and states that it has used Applicant's Mark in connection with the sale of beer in the Commonwealth of Virginia since at least as early as August 29, 2013.

INTERROGATORY NO. 7:

Describe in detail the circumstances surrounding when Applicant ceased using Applicant's Mark in connection with any of Applicant's Goods for any period of time.

RESPONSE TO INTERROGATORY NO. 7:

Applicant objects to this Interrogatory as vague and ambiguous with respect to "circumstances surrounding." Applicant further objects to this Interrogatory insofar as it contains subjective allegations and/or factual assumptions with respect to "when Applicant ceased using Applicant's Mark." By responding to this Interrogatory, Applicant does not admit or accede to any such allegations or assumptions.

Subject to and without waiving the foregoing objections, Applicant responds and states that it has used Applicant's Mark continuously in connection with the sale of beer since at least as early as August 29, 2013.

INTERROGATORY NO. 8:

Describe in detail Applicant's plans to expand the products or services under which Applicant's Mark will be used.

RESPONSE TO INTERROGATORY NO. 8:

Applicant objects to this as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, Applicant responds and states that it does not know its “plans to expand” with respect to Applicant’s Mark.

INTERROGATORY NO. 9:

For each product offered in connection with Applicant’s Mark, state the average wholesale and retail price of each product.

RESPONSE TO INTERROGATORY NO. 9:

Applicant objects to this Interrogatory as vague and ambiguous with respect to “average wholesale and retail price of each product.” It is unclear, for instance, whether the Interrogatory seeks information regarding the “average wholesale and retail price” of all beer sold under Applicant’s Mark, or the “average wholesale and retail price” of each variety of beer sold under Applicant’s Mark. Applicant further objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as overly broad with respect to “each product,” to the extent it purports to seek information regarding goods not recited in U.S. Trademark Application Serial No. 85/920,112.

Subject to and without waiving the foregoing objections, Applicant responds and states that Applicant generally fills a growler of beer for between ten and fifteen dollars.

INTERROGATORY NO. 10:

State your net and gross sales (in units and dollars) and net and gross profits, on a monthly basis, for each of Applicant’s Goods since the date of first sale of each product.

RESPONSE TO INTERROGATORY NO. 10:

Applicant objects to this Interrogatory as vague and ambiguous with respect to “net and gross profits . . . for each of Applicant’s Goods since the date of first sale of each product.” It is unclear, for instance, whether the Interrogatory seeks information regarding the “net and gross profits” for all beer sold under Applicant’s Mark, or the “net and gross profits” for each variety of beer sold under Applicant’s Mark. Applicant further objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as overly broad with respect to “each of Applicant’s Goods,” to the extent it purports to seek information regarding goods not recited in U.S. Trademark Application Serial No. 85/920,112. Applicant further objects to this Interrogatory as overly broad with respect to “on a monthly basis.”

INTERROGATORY NO. 11:

Describe in detail the manner in which you have advertised and/or promoted Applicant’s Goods, including identifying the publications, radio stations, television stations, websites, advertising programs, or other media channels through which you have promoted the products.

RESPONSE TO INTERROGATORY NO. 11:

Applicant objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence. Applicant objects to this Interrogatory as overly broad with respect to “each of Applicant’s Goods,” to the extent it purports to seek information regarding goods not recited in U.S. Trademark Application Serial No. 85/920,112.

Subject to and without waiving the foregoing objections, Applicant responds and states that it has advertised and promoted its beer on its website at <http://threenotchdbrewing.com/>;

through social media; and in print advertisements, representative samples of which will be produced in response to Opposer's First Set of Document Requests.

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 12:

Identify all trade shows or promotional events that Applicant has attended or plans to attend to promote Applicant's Goods under Applicant's Mark or any variation thereof, identifying the name, date, and location of each trade show or event.

RESPONSE TO INTERROGATORY NO. 12:

Applicant objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence, with respect to "plans to attend." Applicant further objects to this Interrogatory as vague and ambiguous, as seeking a legal conclusion, as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence, with respect to "any variation [of Applicant's Mark]." Applicant further objects to this Interrogatory as overly broad with respect to "all trade shows or promotional events."

Subject to and without waiving the foregoing objections, Applicant responds as follows:
None.

INTERROGATORY NO. 13:

Identify, on an annual basis, the dollar amount Applicant spent on advertising Applicant's Mark from the date of first use to the present.

RESPONSE TO INTERROGATORY NO. 13:

Applicant objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as vague and ambiguous insofar as it requests the “amount . . . spent on advertising Applicant’s Mark” as opposed to the beer sold in connection with Applicant’s Mark.

INTERROGATORY NO. 14:

Describe the trade channels, such as retail stores and other outlets, through which Applicant’s Goods have been sold, are currently being sold, or will be sold.

RESPONSE TO INTERROGATORY NO. 14:

Applicant objects to this Interrogatory as vague, ambiguous, and calling for a legal conclusion with respect to “trade channels.” Applicant further objects to this Interrogatory as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to “will be sold.”

Subject to and without waiving the foregoing objections, Applicant responds and states that its beer has been sold in stores, restaurants, and bars. Responding further, Applicant refers to the following page on its website: <http://threenotchdbrewing.com/beer-finder/>.

Discovery is not complete and Applicant’s investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 15:

Describe in detail the level of sophistication/degree of care of the average consumer of Applicant’s Goods.

RESPONSE TO INTERROGATORY NO. 15:

Applicant objects to this Interrogatory as vague, ambiguous, and calling for a legal conclusion with respect to “level of sophistication/degree of care of the average consumer.”

Subject to and without waiving the foregoing objections, Applicant responds and states that Applicant’s Goods are sold to consumers of craft beer.

Discovery is not complete and Applicant’s investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 16:

Identify the customer base for Applicant’s Goods, including identifying and describing the type of individual and demographic to which you market or aim to market the products.

RESPONSE TO INTERROGATORY NO. 16:

Applicant objects to this Interrogatory as vague and ambiguous with respect to “customer base” and “type of individual and demographic.”

Subject to and without waiving the foregoing objections, Applicant responds and states that Applicant’s Goods are sold to consumers of craft beer in the Commonwealth of Virginia.

Discovery is not complete and Applicant’s investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 17:

Describe in detail the circumstances under which Applicant first became aware of Opposer’s Marks or any variation thereof.

RESPONSE TO INTERROGATORY NO. 17:

Applicant objects to this Interrogatory as vague and ambiguous with respect to “circumstances” and “aware.” Applicant further objects to this Interrogatory as vague, ambiguous, overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to “or any variation thereof.”

Subject to and without waiving the foregoing objections, Applicant responds and states that while it has seen one or more of Opposer’s products and/or marketing materials, it does not know the date when it first saw one of Opposer’s products and/or marketing materials.

INTERROGATORY NO. 18:

Describe in detail how and in what way any of Opposer’s Marks or Opposer’s Goods were considered or referenced during the selection, design, development, or clearance of Applicant’s Mark.

RESPONSE TO INTERROGATORY NO. 18:

Applicant objects to this Interrogatory insofar as it contains subjective allegations and/or factual assumptions with respect to “how and in what way any of Opposer’s Marks or Opposer’s Goods were considered or referenced” By responding to this Interrogatory, Applicant does not admit or accede to any such allegations or assumptions.

Subject to and without waiving the foregoing objections, Applicant responds and states that Opposer’s Marks and Opposer’s Goods were not “considered or referenced during the selection, design, development, or clearance of Applicant’s Mark.”

INTERROGATORY NO. 19:

Identify any opinions, written or oral, you have received relating to Opposer’s Goods and/or Opposer’s Marks, including, but not limited to, identifying the person(s) who sought the opinion, the date the opinion was sought, the date the opinion was received, the person(s) who

provided the opinion, the person(s) who received the opinion, and the subject matter of the opinion.

RESPONSE TO INTERROGATORY NO. 19:

Applicant objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as vague and ambiguous insofar as it does not specify a relevant timeframe. Applicant further objects to this Interrogatory insofar as it seeks information that is protected by the attorney-client privilege and/or any other applicable privilege or immunity.

Subject to and without waiving the foregoing objections, Applicant responds as follows:

None.

INTERROGATORY NO. 20:

Identify and describe any inquiries or comments you have received from third-parties relating to Opposer or Opposer's Goods, including, but not limited to, stating who made the inquiry/comment, who received the inquiry/comment, when the inquiry/comment was received, the content of the inquiry/comment, and any steps taken by you after receiving the inquiry/comment.

RESPONSE TO INTERROGATORY NO. 20:

Applicant objects to this Interrogatory as vague and ambiguous with respect to "inquiries or comments . . . relating to Opposer or Opposer's Goods." Applicant further objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as vague and ambiguous insofar as it does not specify a relevant timeframe.

Subject to and without waiving the foregoing objections, Applicant responds as follows:

None.

INTERROGATORY NO. 21:

Describe all third-party uses of Opposer's Marks or marks that you contend are similar to Opposer's Marks, including identifying the third-party and describing the goods or services in connection with which the design was used by the third-party.

RESPONSE TO INTERROGATORY NO. 21:

Applicant objects to this Interrogatory as consisting of multiple discrete sub-parts. Applicant further objects to this Interrogatory as vague and ambiguous with respect to "marks that . . . are similar to Opposer's Marks . . ." Applicant further objects to this Interrogatory as unduly burdensome, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as seeking a legal conclusion with respect to "third-party uses of Opposer's Marks or marks that . . . are similar to Opposer's Marks."

Subject to and without waiving the foregoing objections, Applicant responds and states that it does not have knowledge of specific "third-party uses of Opposer's Mark or marks that . . . are similar to Opposer's Mark."

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 22:

State the complete factual and legal basis for your affirmative defense that "Opposer fails to state a claim upon which relief can be granted."

RESPONSE TO INTERROGATORY NO. 22:

Applicant objects to this Interrogatory as unduly burdensome and premature with respect to "complete factual and legal basis," inasmuch as it purports to ask Applicant to marshal all evidence when discovery and investigation are ongoing.

Subject to and without waiving the foregoing objections, Applicant responds and states that, at a minimum, Opposer has failed to allege any facts supporting its bare conclusion that Applicant's Mark "so resembles Opposer's Claw Iron Marks . . . as to be likely . . . to cause confusion, or to cause mistake or to deceive . . ." *See, e.g., Pure Gold, Inc.*, 221 USPQ 151, 1983 WL 54113, at *3 (TTAB Oct. 27, 1983) (dismissing opposition where opposer "merely pleaded a legal conclusion rather than affirmatively stating facts upon which the Board could find opposer legally entitled to relief"). In addition, Opposer has failed to allege at least one of the elements necessary to bringing a legally sufficient claim under Section 2(a) of the Lanham Act, as prescribed by the Board, namely, that "Applicant is not connected with Opposer or the goods that it provides." *See, e.g., Consolidated Natural Gas Co. v. CNG Fuel Systems, Ltd.*, 228 USPQ 752, 754 (TTAB 1985); *Canovas v. Venezia*, 220 USPQ 660, 661-62 (TTAB 1983).

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 23:

State the complete factual and legal basis for your affirmative defense that "[t]here is no likelihood of confusion, mistake or deception between Applicant's Mark and Opposer's alleged Claw Iron marks because, inter alia, Applicant's mark and Opposer's Alleged Claw Iron marks are not confusingly similar."

RESPONSE TO INTERROGATORY NO. 23:

Applicant objects to this Interrogatory as unduly burdensome and premature with respect to "complete factual and legal basis," inasmuch as it purports to ask Applicant to marshal all evidence when discovery and investigation are ongoing.

Subject to and without waiving the foregoing objections, Applicant responds and states that, at a minimum, Applicant's Mark and Opposer's alleged marks are not confusingly similar

because Applicant's Mark depicts three horizontal notches, resembling the three notches burnt or axed into trees along the Three Notch'd Road, as well as the stylized wording THREE NOTCH'D BREWING COMPANY CHARLOTTESVILLE, VA, whereas Opposer's alleged marks depict a stylized "M" that will be recognized as such by consumers in light of Opposer's trade name "Monster Energy." Accordingly, and in addition to the differences in the parties' respective and unrelated goods, the marks themselves are entirely dissimilar.

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 24:

State the complete factual and legal basis for your affirmative defense that "[t]here is no likelihood of confusion, mistake or deception between Applicant's Mark and Opposer's alleged Claw Iron marks because, inter alia, any rights Opposer may have in the pleaded marks are weak and must be narrowly circumscribed."

RESPONSE TO INTERROGATORY NO. 24:

Applicant objects to this Interrogatory as unduly burdensome and premature with respect to "complete factual and legal basis," inasmuch as it purports to ask Applicant to marshal all evidence when discovery and investigation are ongoing.

Subject to and without waiving the foregoing objections, Applicant responds and states that, at a minimum, any rights in Opposer's alleged marks must be narrowly circumscribed because such marks merely comprise stylized parallel lines and/or a stylized letter M, and consumers will not be confused by the use of all other marks incorporating stylized parallel lines and/or stylized letters with unrelated goods or services.

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 25:

State the complete factual and legal basis for any other affirmative defense upon which you intend to rely other than those set forth in Your responses to Interrogatory Nos. 22-24 above.

RESPONSE TO INTERROGATORY NO. 25:

Applicant objects to this Interrogatory as consisting of multiple discrete sub-parts. Applicant further objects to this Interrogatory as unduly burdensome, premature, and an abuse of the discovery process with respect to "complete factual and legal basis for any . . . affirmative defense," inasmuch as it purports to ask Applicant to plead and prove its entire case in response to one written request, and to marshal all evidence when discovery and investigation are ongoing.

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 26:

Identify the witnesses who Applicant intends to call to testify on its behalf in this Opposition Proceeding and state the subject matter about which each witness is expected to testify.

RESPONSE TO INTERROGATORY NO. 26:

Applicant objects to this Interrogatory as consisting of multiple discrete sub-parts. Applicant further objects to this Interrogatory as unduly burdensome and premature insofar as it purports to ask Applicant to plead and prove its entire case in response to one written request, and to marshal all evidence when discovery and investigation are ongoing.

Subject to and without waiving the foregoing objections, Applicant responds and states that it has not yet determined which witnesses it will call to testify on its behalf in this proceeding.

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 27:

Identify all searches (including trademark searches), research, surveys, studies, polls or investigations conducted by Applicant (including Applicant's agents), concerning Applicant's Mark.

RESPONSE TO INTERROGATORY NO. 27:

Applicant objects to this Interrogatory as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as vague and ambiguous insofar as it does not specify a relevant timeframe. Applicant further objects to this Interrogatory as vague and ambiguous with respect to "searches . . . research . . . or investigations . . . concerning Applicant's Mark." Applicant further objects to this Interrogatory insofar as it seeks information that is protected by the attorney-client privilege and/or any other applicable privilege or immunity.

Subject to and without waiving the foregoing objections, Applicant responds and states that Applicant conducted general searches and/or research prior to developing Applicant's Mark, but that it is not aware of any records or documentation of such searches or research.

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 28:

Describe any research (including, but not limited to, surveys, polls, market research investigations, analyses, studies, or searches) regarding Applicant's Goods, including, but not limited to, stating the person(s) who authorized the research, when the research was conducted, the person(s) who conducted the research, the reason the research was conducted, the results of the research, and identifying all documents relating to the research.

RESPONSE TO INTERROGATORY NO. 28:

Applicant objects to this Interrogatory as overly broad, unduly burdensome, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as vague and ambiguous insofar as it does not specify a relevant timeframe. Applicant further objects to this Interrogatory as vague and ambiguous with respect to "research . . . regarding Applicant's Goods." Applicant further objects to this Interrogatory insofar as it seeks information that is protected by the attorney-client privilege and/or any other applicable privilege or immunity.

INTERROGATORY NO. 29:

State the complete factual and legal basis for any denials of any of Opposer's First Set of Requests for Admissions.

RESPONSE TO INTERROGATORY NO. 29:

Applicant objects to this Interrogatory as consisting of multiple discrete sub-parts. Applicant further objects to this Interrogatory as unduly burdensome and premature with respect to "complete factual and legal basis," inasmuch as it purports to ask Applicant to marshal all evidence while discovery and investigation are ongoing.

Subject to and without waiving the foregoing objections, Applicant responds and refers to its responses to Opposer's First Set of Requests for Admission.

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

**THREE NOTCH'D BREWING COMPANY, LLC,
Applicant**

Date: March 17, 2015

By: / Robert C. Van Arnam /
Robert C. Van Arnam, Esquire
Williams Mullen
301 Fayetteville Street, Suite 1700
Raleigh, NC 27601
Telephone: (919) 981-4000
Facsimile: (919) 981-4300
Email: rvanarnam@williamsmullen.com

Thomas F. Bergert, Esquire
Williams Mullen
321 East Main St., Suite 400
Charlottesville, Virginia 22902-3200
Telephone: (434) 951-5700
Facsimile: (434) 817-0977
Email: tbergert@williamsmullen.com

Counsel for Applicant

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 2015, the foregoing APPLICANT'S OBJECTIONS AND RESPONSES TO OPPOSER'S FIRST SET OF INTERROGATORIES has been served on Opposer, Monster Energy Company, by mailing a true and correct copy of the same by first class mail, postage prepaid, to:

Stephen J. Nataupsky
Diane M. Reed
Jonathan A. Menkes
Knobbe, Martens, Olson & Bear, LLP
2040 Main Street, Fourteenth Floor
Irvine, CA 92614

/ Robert C. Van Arnam /
Robert C. Van Arnam, Esquire
Williams Mullen
301 Fayetteville Street, Suite 1700
Raleigh, NC 27601
Telephone: (919) 981-4000
Facsimile: (919) 981-4300
Email: rvanarnam@williamsmullen.com

Thomas F. Bergert, Esquire
Williams Mullen
321 East Main St., Suite 400
Charlottesville, Virginia 22902-3200
Telephone: (434) 951-5700
Facsimile: (434) 817-0977
Email: tbergert@williamsmullen.com

Counsel for Applicant

EXHIBIT 5

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Serial No. 85/920,112

TO OPPOSER'S FIRST SET OF INTERROGATORIES (NOS. 1-29)

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure Applicant Three Notch'd Brewing Company, LLC ("Applicant") hereby supplements its objections and responses to Opposer Monster Energy Company's ("Opposer") First Set of Interrogatories (Nos. 1-29) ("Interrogatories") as follows:

OBJECTIONS TO DEFINITIONS

1. Applicant objects to the definition of “Applicant” as overly broad and as seeking information not in the possession, custody, or control of Applicant with respect to “any . . . former owner, officer, director, employee, servant, agent, attorney or other representative acting on behalf of it . . .” and “any related entity . . . or affiliate.”

2. Applicant objects to the definition of “person” as overly broad with respect to “and the acts and knowledge of a person are defined to include the acts and knowledge of that person’s directors, officers, members, employees, representatives, agents and attorneys.”

3. Applicant objects to the definition of “Applicant’s Goods” as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably

calculated to lead to the discovery of admissible evidence with respect to “the goods Applicant offers or sells, has offered or sold, or intends to offer or sell, in connection with Applicant’s Mark,” to the extent it purports to include goods not recited in U.S. Trademark Application Serial No. 85/920,112.

4. Applicant objects to the definition of “Opposer’s Goods” as vague and ambiguous with respect to “all of the goods covered under Opposer’s Marks,” to the extent it purports to include goods not referenced in Opposer’s Notice of Opposition.

OBJECTIONS TO INSTRUCTIONS

1. Applicant objects to the Instructions to the extent they purport to impose obligations beyond those required by applicable rules, including the Federal Rules of Civil Procedure and the Trademark Trial and Appeal Board Manual of Procedure (TBMP). Applicant will respond to the Interrogatories in accordance with applicable rules.

2. Applicant objects to the Instructions to the extent that they seek to compel production of confidential, proprietary, or trade secret information. Applicant will only provide such information, to the extent it exists, in accordance with a protective order entered by the parties.

3. Applicant objects to Instructions, including without limitation Instruction Nos. 1 and 2, as overly broad and unduly burdensome to the extent they require Applicant to supply information and/or documents and things that are not in Applicant’s possession, custody, or control, or seek to compel Applicant to generate or create information and/or documents and things that do not already exist or are not maintained by Applicant in the ordinary course of business. Applicant will respond to the Interrogatories in accordance with applicable rules.

OBJECTIONS AND RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

Identify each person involved with the design, development, selection or approval of Applicant's Mark, and for each person so identified, describe their role in such design, development, selection, or approval.

RESPONSE TO INTERROGATORY NO. 1:

Applicant objects to this Interrogatory as overly broad, vague, and ambiguous with respect to "involved with."

Subject to and without waiving the foregoing objections, Applicant responds and identifies the following:

- a) **George Kastendike, Chairman, CEO, and Founder, Three Notch'd Brewing Company, LLC.** Mr. Kastendike was involved in the design, development, selection, and approval of Applicant's Mark, as CEO and Founder of Applicant. Mr. Kastendike should only be contacted through counsel for Applicant.
- b) **Scott Roth, President and COO, Three Notch'd Brewing Company, LLC.** Mr. Roth was involved in the selection and approval of Applicant's Mark, as President and COO of Applicant. Mr. Roth should only be contacted through counsel for Applicant.
- c) **Paul Dierkes (paul@okayyellow.com) and Joel Artz (joel@okayyellow.com), Okay Yellow Design Lab.** Messrs. Dierkes and Artz were involved in the design and development of Applicant's Mark.

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 2:

Describe in detail any use by Applicant of any variation of Applicant's Mark in connection with Applicant's Goods.

RESPONSE TO INTERROGATORY NO. 2:

Applicant objects to this Interrogatory as vague and ambiguous, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to "any variation of Applicant's Mark," insofar as it seeks information pertaining to marks other than Applicant's Mark, or to Applicant's Mark other than in its entirety.

Subject to and without waiving the foregoing objections, Applicant responds and states that it uses Applicant's Mark in connection with the promotion and sale of beer, and that representative samples of such use will be produced in response to Opposer's First Set of Document Requests.

INTERROGATORY NO. 3:

Describe in detail the circumstances surrounding Applicant's selection or adoption of Applicant's Mark.

RESPONSE TO INTERROGATORY NO. 3:

Applicant objects to this Interrogatory as overly broad, vague, and ambiguous with respect to "circumstances surrounding."

Subject to and without waiving the foregoing objections, Applicant responds as follows: Applicant's Mark is a reference to the Three Notch'd Road, a colonial-era road running east and west through central Virginia that was made famous by Jack Jouett's midnight ride to Charlottesville, Virginia in June of 1781 to warn then-Governor Thomas Jefferson and his state legislators that the British cavalry were coming to capture them. The road is believed to have

taken its name from a distinctive marking of three notches burnt or axed into trees to blaze the trail. Applicant's Mark similarly features three notches and takes its name from that of the original trail, which runs less than a quarter mile from the location of Applicant's brewery.

INTERROGATORY NO. 4:

Describe in detail all goods ever offered for sale or sold by Applicant in connection with Applicant's Mark in the U.S.

RESPONSE TO INTERROGATORY NO. 4:

Applicant objects to this Interrogatory as overly broad with respect to "all goods ever," insofar as it is not limited to the goods recited in U.S. Trademark Application Serial No. 85/920,112.

Subject to and without waiving the foregoing objections, Applicant responds as follows:
beer; apparel; glasses; growlers.

INTERROGATORY NO. 5:

For each of Applicant's Goods, identify the date the good was first offered for sale or sold in connection with Applicant's Mark.

RESPONSE TO INTERROGATORY NO. 5:

Applicant objects to this Interrogatory as overly broad with respect to "each of Applicant's Goods," to the extent it purports to seek information regarding goods not recited in U.S. Trademark Application Serial No. 85/920,112.

Subject to and without waiving the foregoing objections, Applicant responds and states that it has used Applicant's Mark in connection with the sale of beer since at least as early as August 29, 2013.

INTERROGATORY NO. 6:

Identify each state where Applicant's Goods have been or are currently sold in connection with Applicant's Mark and state the date on which sales began in each state.

RESPONSE TO INTERROGATORY NO. 6:

Applicant objects to this Interrogatory as consisting of multiple discrete sub-parts. Applicant further objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, Applicant responds and states that it has used Applicant's Mark in connection with the sale of beer in the Commonwealth of Virginia since at least as early as August 29, 2013.

INTERROGATORY NO. 7:

Describe in detail the circumstances surrounding when Applicant ceased using Applicant's Mark in connection with any of Applicant's Goods for any period of time.

RESPONSE TO INTERROGATORY NO. 7:

Applicant objects to this Interrogatory as vague and ambiguous with respect to "circumstances surrounding." Applicant further objects to this Interrogatory insofar as it contains subjective allegations and/or factual assumptions with respect to "when Applicant ceased using Applicant's Mark." By responding to this Interrogatory, Applicant does not admit or accede to any such allegations or assumptions.

Subject to and without waiving the foregoing objections, Applicant responds and states that it has used Applicant's Mark continuously in connection with the sale of beer since at least as early as August 29, 2013.

INTERROGATORY NO. 8:

Describe in detail Applicant's plans to expand the products or services under which Applicant's Mark will be used.

RESPONSE TO INTERROGATORY NO. 8:

Applicant objects to this as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, Applicant responds and states that it does not know its “plans to expand” with respect to Applicant’s Mark.

INTERROGATORY NO. 9:

For each product offered in connection with Applicant’s Mark, state the average wholesale and retail price of each product.

RESPONSE TO INTERROGATORY NO. 9:

Applicant objects to this Interrogatory as vague and ambiguous with respect to “average wholesale and retail price of each product.” It is unclear, for instance, whether the Interrogatory seeks information regarding the “average wholesale and retail price” of all beer sold under Applicant’s Mark, or the “average wholesale and retail price” of each variety of beer sold under Applicant’s Mark. Applicant further objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as overly broad with respect to “each product,” to the extent it purports to seek information regarding goods not recited in U.S. Trademark Application Serial No. 85/920,112.

Subject to and without waiving the foregoing objections, Applicant responds and states that Applicant generally fills a growler of beer for between ten and fifteen dollars.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 9:

Subject to and without waiving the foregoing objections, Applicant further responds and states that Applicant’s average wholesale and retail price of beer is as follows:

Distributor pricing:

1/2 Keg Wholesale	1/4 Keg Wholesale	1/2 Keg Retail	1/4 Keg Retail	Case Wholesale	Case Retail
\$105-175	\$58-118	\$143-209	\$75-150	\$21-84	\$30-108

Tap room pricing:

1/2 Keg	1/4 Keg	Draft Price	6-Pack Price
\$150-190	\$80-110	\$5-6	\$10

INTERROGATORY NO. 10:

State your net and gross sales (in units and dollars) and net and gross profits, on a monthly basis, for each of Applicant's Goods since the date of first sale of each product.

RESPONSE TO INTERROGATORY NO. 10:

Applicant objects to this Interrogatory as vague and ambiguous with respect to "net and gross profits . . . for each of Applicant's Goods since the date of first sale of each product." It is unclear, for instance, whether the Interrogatory seeks information regarding the "net and gross profits" for all beer sold under Applicant's Mark, or the "net and gross profits" for each variety of beer sold under Applicant's Mark. Applicant further objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as overly broad with respect to "each of Applicant's Goods," to the extent it purports to seek information regarding goods not recited in U.S. Trademark Application Serial No. 85/920,112. Applicant further objects to this Interrogatory as overly broad with respect to "on a monthly basis."

INTERROGATORY NO. 11:

Describe in detail the manner in which you have advertised and/or promoted Applicant's Goods, including identifying the publications, radio stations, television stations, websites, advertising programs, or other media channels through which you have promoted the products.

RESPONSE TO INTERROGATORY NO. 11:

Applicant objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence. Applicant objects to this Interrogatory as overly broad with respect to "each of Applicant's Goods," to the extent it purports to seek information regarding goods not recited in U.S. Trademark Application Serial No. 85/920,112.

Subject to and without waiving the foregoing objections, Applicant responds and states that it has advertised and promoted its beer on its website at <http://threenotchdbrewing.com/>; through social media; and in print advertisements, representative samples of which will be produced in response to Opposer's First Set of Document Requests.

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 12:

Identify all trade shows or promotional events that Applicant has attended or plans to attend to promote Applicant's Goods under Applicant's Mark or any variation thereof, identifying the name, date, and location of each trade show or event.

RESPONSE TO INTERROGATORY NO. 12:

Applicant objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence, with respect to "plans to attend." Applicant further objects to this Interrogatory as vague and ambiguous, as seeking a legal conclusion, as not relevant to any

claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence, with respect to “any variation [of Applicant’s Mark].” Applicant further objects to this Interrogatory as overly broad with respect to “all trade shows or promotional events.”

Subject to and without waiving the foregoing objections, Applicant responds as follows:

None.

INTERROGATORY NO. 13:

Identify, on an annual basis, the dollar amount Applicant spent on advertising Applicant’s Mark from the date of first use to the present.

RESPONSE TO INTERROGATORY NO. 13:

Applicant objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as vague and ambiguous insofar as it requests the “amount . . . spent on advertising Applicant’s Mark” as opposed to the beer sold in connection with Applicant’s Mark.

INTERROGATORY NO. 14:

Describe the trade channels, such as retail stores and other outlets, through which Applicant’s Goods have been sold, are currently being sold, or will be sold.

RESPONSE TO INTERROGATORY NO. 14:

Applicant objects to this Interrogatory as vague, ambiguous, and calling for a legal conclusion with respect to “trade channels.” Applicant further objects to this Interrogatory as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to “will be sold.”

Subject to and without waiving the foregoing objections, Applicant responds and states that its beer has been sold in stores, restaurants, and bars. Responding further, Applicant refers to the following page on its website: <http://threenotchdbrewing.com/beer-finder/>.

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 14:

Subject to and without waiving the foregoing objections, Applicant further responds and refers Opposer to Applicant's Exhibit 47 produced in this proceeding.

INTERROGATORY NO. 15:

Describe in detail the level of sophistication/degree of care of the average consumer of Applicant's Goods.

RESPONSE TO INTERROGATORY NO. 15:

Applicant objects to this Interrogatory as vague, ambiguous, and calling for a legal conclusion with respect to "level of sophistication/degree of care of the average consumer."

Subject to and without waiving the foregoing objections, Applicant responds and states that Applicant's Goods are sold to consumers of craft beer.

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 16:

Identify the customer base for Applicant's Goods, including identifying and describing the type of individual and demographic to which you market or aim to market the products.

RESPONSE TO INTERROGATORY NO. 16:

Applicant objects to this Interrogatory as vague and ambiguous with respect to “customer base” and “type of individual and demographic.”

Subject to and without waiving the foregoing objections, Applicant responds and states that Applicant’s Goods are sold to consumers of craft beer in the Commonwealth of Virginia.

Discovery is not complete and Applicant’s investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 17:

Describe in detail the circumstances under which Applicant first became aware of Opposer’s Marks or any variation thereof.

RESPONSE TO INTERROGATORY NO. 17:

Applicant objects to this Interrogatory as vague and ambiguous with respect to “circumstances” and “aware.” Applicant further objects to this Interrogatory as vague, ambiguous, overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence, with respect to “or any variation thereof.”

Subject to and without waiving the foregoing objections, Applicant responds and states that while it has seen one or more of Opposer’s products and/or marketing materials, it does not know the date when it first saw one of Opposer’s products and/or marketing materials.

INTERROGATORY NO. 18:

Describe in detail how and in what way any of Opposer’s Marks or Opposer’s Goods were considered or referenced during the selection, design, development, or clearance of Applicant’s Mark.

RESPONSE TO INTERROGATORY NO. 18:

Applicant objects to this Interrogatory insofar as it contains subjective allegations and/or factual assumptions with respect to “how and in what way any of Opposer’s Marks or Opposer’s Goods were considered or referenced” By responding to this Interrogatory, Applicant does not admit or accede to any such allegations or assumptions.

Subject to and without waiving the foregoing objections, Applicant responds and states that Opposer’s Marks and Opposer’s Goods were not “considered or referenced during the selection, design, development, or clearance of Applicant’s Mark.”

INTERROGATORY NO. 19:

Identify any opinions, written or oral, you have received relating to Opposer’s Goods and/or Opposer’s Marks, including, but not limited to, identifying the person(s) who sought the opinion, the date the opinion was sought, the date the opinion was received, the person(s) who provided the opinion, the person(s) who received the opinion, and the subject matter of the opinion.

RESPONSE TO INTERROGATORY NO. 19:

Applicant objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as vague and ambiguous insofar as it does not specify a relevant timeframe. Applicant further objects to this Interrogatory insofar as it seeks information that is protected by the attorney-client privilege and/or any other applicable privilege or immunity.

Subject to and without waiving the foregoing objections, Applicant responds as follows:
None.

INTERROGATORY NO. 20:

Identify and describe any inquiries or comments you have received from third-parties relating to Opposer or Opposer’s Goods, including, but not limited to, stating who made the

inquiry/comment, who received the inquiry/comment, when the inquiry/comment was received, the content of the inquiry/comment, and any steps taken by you after receiving the inquiry/comment.

RESPONSE TO INTERROGATORY NO. 20:

Applicant objects to this Interrogatory as vague and ambiguous with respect to “inquiries or comments . . . relating to Opposer or Opposer’s Goods.” Applicant further objects to this Interrogatory as not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as vague and ambiguous insofar as it does not specify a relevant timeframe.

Subject to and without waiving the foregoing objections, Applicant responds as follows:

None.

INTERROGATORY NO. 21:

Describe all third-party uses of Opposer’s Marks or marks that you contend are similar to Opposer’s Marks, including identifying the third-party and describing the goods or services in connection with which the design was used by the third-party.

RESPONSE TO INTERROGATORY NO. 21:

Applicant objects to this Interrogatory as consisting of multiple discrete sub-parts. Applicant further objects to this Interrogatory as vague and ambiguous with respect to “marks that . . . are similar to Opposer’s Marks . . .” Applicant further objects to this Interrogatory as unduly burdensome, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as seeking a legal conclusion with respect to “third-party uses of Opposer’s Marks or marks that . . . are similar to Opposer’s Marks.”

Subject to and without waiving the foregoing objections, Applicant responds and states that it does not have knowledge of specific “third-party uses of Opposer’s Mark or marks that . . . are similar to Opposer’s Mark.”

Discovery is not complete and Applicant’s investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 22:

State the complete factual and legal basis for your affirmative defense that “Opposer fails to state a claim upon which relief can be granted.”

RESPONSE TO INTERROGATORY NO. 22:

Applicant objects to this Interrogatory as unduly burdensome and premature with respect to “complete factual and legal basis,” inasmuch as it purports to ask Applicant to marshal all evidence when discovery and investigation are ongoing.

Subject to and without waiving the foregoing objections, Applicant responds and states that, at a minimum, Opposer has failed to allege any facts supporting its bare conclusion that Applicant’s Mark “so resembles Opposer’s Claw Iron Marks . . . as to be likely . . . to cause confusion, or to cause mistake or to deceive . . .” *See, e.g., Pure Gold, Inc.*, 221 USPQ 151, 1983 WL 54113, at *3 (TTAB Oct. 27, 1983) (dismissing opposition where opposer “merely pleaded a legal conclusion rather than affirmatively stating facts upon which the Board could find opposer legally entitled to relief”). In addition, Opposer has failed to allege at least one of the elements necessary to bringing a legally sufficient claim under Section 2(a) of the Lanham Act, as prescribed by the Board, namely, that “Applicant is not connected with Opposer or the goods that it provides.” *See, e.g., Consolidated Natural Gas Co. v. CNG Fuel Systems, Ltd.*, 228 USPQ 752, 754 (TTAB 1985); *Canovas v. Venezia*, 220 USPQ 660, 661-62 (TTAB 1983).

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 23:

State the complete factual and legal basis for your affirmative defense that "[t]here is no likelihood of confusion, mistake or deception between Applicant's Mark and Opposer's alleged Claw Iron marks because, inter alia, Applicant's mark and Opposer's Alleged Claw Iron marks are not confusingly similar."

RESPONSE TO INTERROGATORY NO. 23:

Applicant objects to this Interrogatory as unduly burdensome and premature with respect to "complete factual and legal basis," inasmuch as it purports to ask Applicant to marshal all evidence when discovery and investigation are ongoing.

Subject to and without waiving the foregoing objections, Applicant responds and states that, at a minimum, Applicant's Mark and Opposer's alleged marks are not confusingly similar because Applicant's Mark depicts three horizontal notches, resembling the three notches burnt or axed into trees along the Three Notch'd Road, as well as the stylized wording THREE NOTCH'D BREWING COMPANY CHARLOTTESVILLE, VA, whereas Opposer's alleged marks depict a stylized "M" that will be recognized as such by consumers in light of Opposer's trade name "Monster Energy." Accordingly, and in addition to the differences in the parties' respective and unrelated goods, the marks themselves are entirely dissimilar.

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 24:

State the complete factual and legal basis for your affirmative defense that “[t]here is no likelihood of confusion, mistake or deception between Applicant’s Mark and Opposer’s alleged Claw Iron marks because, inter alia, any rights Opposer may have in the pleaded marks are weak and must be narrowly circumscribed.”

RESPONSE TO INTERROGATORY NO. 24:

Applicant objects to this Interrogatory as unduly burdensome and premature with respect to “complete factual and legal basis,” inasmuch as it purports to ask Applicant to marshal all evidence when discovery and investigation are ongoing.

Subject to and without waiving the foregoing objections, Applicant responds and states that, at a minimum, any rights in Opposer’s alleged marks must be narrowly circumscribed because such marks merely comprise stylized parallel lines and/or a stylized letter M, and consumers will not be confused by the use of all other marks incorporating stylized parallel lines and/or stylized letters with unrelated goods or services.

Discovery is not complete and Applicant’s investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 25:

State the complete factual and legal basis for any other affirmative defense upon which you intend to rely other than those set forth in Your responses to Interrogatory Nos. 22-24 above.

RESPONSE TO INTERROGATORY NO. 25:

Applicant objects to this Interrogatory as consisting of multiple discrete sub-parts. Applicant further objects to this Interrogatory as unduly burdensome, premature, and an abuse of the discovery process with respect to “complete factual and legal basis for any . . . affirmative defense,” inasmuch as it purports to ask Applicant to plead and prove its entire case in response

to one written request, and to marshal all evidence when discovery and investigation are ongoing.

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 26:

Identify the witnesses who Applicant intends to call to testify on its behalf in this Opposition Proceeding and state the subject matter about which each witness is expected to testify.

RESPONSE TO INTERROGATORY NO. 26:

Applicant objects to this Interrogatory as consisting of multiple discrete sub-parts. Applicant further objects to this Interrogatory as unduly burdensome and premature insofar as it purports to ask Applicant to plead and prove its entire case in response to one written request, and to marshal all evidence when discovery and investigation are ongoing.

Subject to and without waiving the foregoing objections, Applicant responds and states that it has not yet determined which witnesses it will call to testify on its behalf in this proceeding.

Discovery is not complete and Applicant's investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

INTERROGATORY NO. 27:

Identify all searches (including trademark searches), research, surveys, studies, polls or investigations conducted by Applicant (including Applicant's agents), concerning Applicant's Mark.

RESPONSE TO INTERROGATORY NO. 27:

Applicant objects to this Interrogatory as overly broad, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as vague and ambiguous insofar as it does not specify a relevant timeframe. Applicant further objects to this Interrogatory as vague and ambiguous with respect to “searches . . . research . . . or investigations . . . concerning Applicant’s Mark.” Applicant further objects to this Interrogatory insofar as it seeks information that is protected by the attorney-client privilege and/or any other applicable privilege or immunity.

Subject to and without waiving the foregoing objections, Applicant responds and states that Applicant conducted general searches and/or research prior to developing Applicant’s Mark, but that it is not aware of any records or documentation of such searches or research.

Discovery is not complete and Applicant’s investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 27:

Subject to and without waiving the foregoing objections, Applicant further responds and states that it conducted an enormous amount of primarily historical research via internet search engines, such as Google, Bing and Yahoo, as well as research at the University of Virginia library. Further responding, Applicant states that it researched and interviewed several successful breweries to understand the best way they built their brand. Through this research, Applicant determined that it wanted to build its brand and message around something locally and historically relevant.

INTERROGATORY NO. 28:

Describe any research (including, but not limited to, surveys, polls, market research investigations, analyses, studies, or searches) regarding Applicant's Goods, including, but not limited to, stating the person(s) who authorized the research, when the research was conducted, the person(s) who conducted the research, the reason the research was conducted, the results of the research, and identifying all documents relating to the research.

RESPONSE TO INTERROGATORY NO. 28:

Applicant objects to this Interrogatory as overly broad, unduly burdensome, not relevant to any claim, defense, or counterclaim raised in this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence. Applicant further objects to this Interrogatory as vague and ambiguous insofar as it does not specify a relevant timeframe. Applicant further objects to this Interrogatory as vague and ambiguous with respect to "research . . . regarding Applicant's Goods." Applicant further objects to this Interrogatory insofar as it seeks information that is protected by the attorney-client privilege and/or any other applicable privilege or immunity.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 28:

Subject to and without waiving the foregoing objections, Applicant refers to its response to Interrogatory No. 27. Applicant further responds that it conducted limited market research in approximately December, 2012 into the locations for its breweries, the price points for its beer and what types of varieties of beer consumers of craft beer preferred. That research was authorized by George Kastendike and/or Scott Roth

INTERROGATORY NO. 29:

State the complete factual and legal basis for any denials of any of Opposer's First Set of Requests for Admissions.

RESPONSE TO INTERROGATORY NO. 29:

Applicant objects to this Interrogatory as consisting of multiple discrete sub-parts. Applicant further objects to this Interrogatory as unduly burdensome and premature with respect to “complete factual and legal basis,” inasmuch as it purports to ask Applicant to marshal all evidence while discovery and investigation are ongoing.

Subject to and without waiving the foregoing objections, Applicant responds and refers to its responses to Opposer’s First Set of Requests for Admission.

Discovery is not complete and Applicant’s investigation is continuing. Pursuant to Fed. R. Civ. P. 26(e), Applicant expressly reserves the right to supplement, amend, and/or modify its response.

THREE NOTCH’D BREWING COMPANY, LLC,
Applicant

Date: May 14, 2015

By:

/ Robert C. Van Arnam /

Robert C. Van Arnam, Esquire
Williams Mullen
301 Fayetteville Street, Suite 1700
Raleigh, NC 27601
Telephone: (919) 981-4000
Facsimile: (919) 981-4300
Email: rvanarnam@williamsmullen.com

Thomas F. Bergert, Esquire
Williams Mullen
321 East Main St., Suite 400
Charlottesville, Virginia 22902-3200
Telephone: (434) 951-5700
Facsimile: (434) 817-0977
Email: tbergert@williamsmullen.com

Counsel for Applicant

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2015, the foregoing APPLICANT'S FIRST SUPPLEMENTAL OBJECTIONS AND RESPONSES TO OPPOSER'S FIRST SET OF INTERROGATORIES has been served on Opposer, Monster Energy Company, by mailing a true and correct copy of the same by first class mail, postage prepaid, to:

Stephen J. Nataupsky
Diane M. Reed
Jonathan A. Menkes
Knobbe, Martens, Olson & Bear, LLP
2040 Main Street, Fourteenth Floor
Irvine, CA 92614

/ Robert C. Van Arnam /

Robert C. Van Arnam, Esquire
Williams Mullen
301 Fayetteville Street, Suite 1700
Raleigh, NC 27601
Telephone: (919) 981-4000
Facsimile: (919) 981-4300
Email: rvanarnam@williamsmullen.com

Thomas F. Bergert, Esquire
Williams Mullen
321 East Main St., Suite 400
Charlottesville, Virginia 22902-3200
Telephone: (434) 951-5700
Facsimile: (434) 817-0977
Email: tbergert@williamsmullen.com

Counsel for Applicant

EXHIBIT 6



KNOBBE, MARTENS, OLSON & BEAR, LLP

2040 Main St., 14th Fl., Irvine, CA 92614
T (949) 760-0404

Jonathan A. Menkes
Jonathan.Menkes@knobbe.com

May 1, 2015

VIA ELECTRONIC MAIL

Thomas F. Bergert
Williams Mullen
321 East Main Street
Suite 400
Charlottesville, VA 22902-3200
tbergert@williamsmullen.com

Re: Monster Energy Company v. Three Notch'd Brewing Company, LLC
Opposition No. 91217273
Deficiencies in Three Notch'd Brewing Company, LLC's Discovery Responses
Our Ref.: HANBEV.2514M

Dear Mr. Bergert:

We have reviewed Three Notch'd Brewing Company, LLC's ("Applicant") responses to Monster Energy Company's First Set of Document Requests (Request Nos. 1-58) and Monster Energy Company's First Set of Interrogatories (Nos. 1-29). We have identified a number of deficiencies in Applicant's responses as set forth below.

To date, Applicant has only produced 53 documents in response to Opposer's Requests for Production of Documents. As a preliminary note, Applicant's Initial Disclosures broadly identified several categories and types of documents in its custody or control that have not been produced, including the following documents:

- Documents reflecting Applicant's creation and first use of the trademark;
- Magazine articles, newspaper articles, television commercials, industry publication articles, and press releases;
- Marketing materials;
- Documents relating to Applicant's customers and market;
- Documents reflecting Opposer's goods and services;
- Documents related to Opposer's assertion of fame;
- Documents related to the validity of and rights in Opposer's "M" and/or "claw" marks; and
- Documents reflecting third party use and registration of relevant marks.

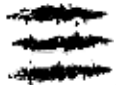
Please produce copies of all documents identified in Applicant's Initial Disclosures, as requested in Opposer's Document Request No. 9.

I. Applicant's Responses to Opposer's First Set of Requests for Production of Documents

A. Applicant's Objections and Refusal to Respond to Document Requests Nos. 8, 20-26, 34, 36-38, 48-50, 52, 53, and 58

Applicant's responses to Opposer's Document Requests Nos. 8, 20-26, 34, 36-38, 48-50, 52, 53, and 58 indicate that Applicant is refusing to produce documents responsive to these requests. Applicant's objections to these requests are unfounded and improper.

Specifically, Applicant should produce documents related to its marketing, advertising, and business plans for any products or services sold under Applicant's Mark or additional marks that include the following

portion of Applicant's Mark: . (See Requests Nos. 8, 20, and 21). Applicant's objections that these requests are "overly broad," "unduly burdensome," and "not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence" are meritless. The requested documents are relevant to the *DuPont* factors, including, but not limited to, the opportunity for actual confusion in the market place to occur and the similarity of the trade channels used or the trade channels in which Applicant's Goods are likely to expand. Accordingly, Opposer requests that Applicant produce documents responsive to these requests.

Applicant should also produce financial documents related to its sales and the prices Applicant charges for its goods. (See Requests Nos. 22-25). Applicant's objections that these requests are "overly broad" and "not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence" are unfounded. Such financial documents are relevant to the *DuPont* factors, including, but not limited to, the opportunity for actual confusion in the market place to occur and the sophistication of consumers (impulse vs. deliberate purchasing). The requests are also limited to documents specific to Applicant's Mark or Goods, which are clearly relevant to this proceeding. Accordingly, Opposer requests that Applicant produce documents responsive to these requests.

Applicant should also produce documents related to its advertising, the commercial impression of Applicant's Mark, the types of consumers that purchase Applicant's Goods, and the geographic markets where such goods are sold. (See Request Nos. 26, 34, 36-38). Applicant's objections that these requests are "overly broad," "unduly burdensome," and "not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence" are meritless. The requested documents are relevant to the *DuPont* factors, including, but not limited to, the similarity of the marks and trade channels at issue. The requests are also limited to documents specific to Applicant's Mark or Goods, which are clearly relevant to this proceeding. Further, Applicant's objections that the requests are "vague" and "ambiguous" are also meritless. The terms and phrases objected to are commonly understood and completely comprehensible. Accordingly, Opposer requests that Applicant produce documents responsive to these requests.

Applicant should also produce documents related to any agreements or acquisition of rights concerning Applicant's Mark. (See Request Nos. 48-50). Applicant's objections that these requests are "overly broad," "unduly burdensome," and "not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence" are improper. These documents are relevant to Applicant's alleged entitlement to file for the mark at issue and also the *DuPont* factors, including, but not limited to, the extent to which Applicant has a right to exclude others from use of its mark on its goods. Accordingly, Opposer requests that Applicant produce documents responsive to these requests.

Applicant should also produce documents related to other proceedings or enforcement efforts concerning Applicant's Mark. (See Request Nos. 52 and 53). Applicant's objections that these requests are "overly broad," "unduly burdensome," and "not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence" are improper. Documents relating to other proceedings or enforcement efforts concerning Applicant's Mark are relevant to the *DuPont* factors, including, but not limited to, the extent to which Applicant has the right to exclude others from use of its mark on its goods, and the number and nature of similar marks in use on similar goods. Accordingly, Opposer requests that Applicant produce documents responsive to these requests.

Finally, Applicant should produce documents related to any other marks used in connection with Applicant's Goods. (See Request No. 58). Applicant's objection that this request is "overly broad," "unduly burdensome," and "not relevant to any claim, defense, or counterclaim raised in this proceeding, and as not reasonably calculated to lead to the discovery of admissible evidence" is meritless. For example, documents relating to other marks used in connection with Applicant's Goods may be relevant to Applicant's intent in

selecting the mark at issue in this proceeding. Accordingly, Opposer requests that Applicant produce documents responsive to this request.

B. Applicant's Failure to Produce Any Documents In Response to Document Requests Nos. 4-5, 12-14, 44, 54, 57

Applicant's responses to Opposer's Document Requests Nos. 4-5, 12-14, 44, 54, and 57 indicate that Applicant "has produced or will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant's possession, custody, or control, and are not privileged or otherwise immune from discovery." However, it does not appear that Applicant has produced any documents responsive to these requests. Please confirm that Applicant will produce all documents responsive to these requests, or confirm that no responsive documents exist.

C. Applicant's Deficient Production of Documents Responsive to Document Requests Nos. 1, 9, 15-17, 27- 31, 35, 54, 56

Applicant's responses to Opposer's Document Requests Nos. 1, 9, 15-17, 27- 31, 35, 54, and 56 indicate that Applicant "will produce, or make available for inspection, documents responsive to this Request, to the extent any exist, are in Applicant's possession, custody, or control, and are not privileged or otherwise immune from discovery." Opposer has reviewed Applicant's production and the documents responsive to these requests are deficient. For example, Applicant has produced only one document (a blog post) showing any mention of Applicant's Mark in the press. (See Request Nos. 28, 29). Please confirm that Applicant will produce all documents responsive to these requests, or confirm that no additional responsive documents exist.

II. Applicant' Responses to Opposer's First Set of Interrogatories

Interrogatory No. 9:

Interrogatory No. 9 seeks "the average wholesale and retail price of each product" offered under Applicant's Mark. Applicant responded that it "generally fills a growler of beer for between ten and fifteen dollars." However, it appears that Applicant also sells other goods under Applicant's Mark, such as cans of beer. Opposer requests that Applicant supplement its response to this Interrogatory to include the wholesale and retail price of all goods sold under Applicant's Mark.

Interrogatory No. 10:

Interrogatory No. 10 seeks "net and gross sales (in units and dollars)...for each of Applicant's Goods since the date of first sale for each product." Applicant's objection that the Interrogatory is not relevant to any claim or defense is unfounded. The amount of sales is relevant to the *DuPont* factors, including, but not limited to, establishing the extent to which Applicant has used Applicant's Mark and, for example, the opportunity for actual confusion to occur in the marketplace. Accordingly, Applicant must supplement its response to this Interrogatory.

Interrogatory No. 13:

Interrogatory No. 13 seeks "the dollar amount Applicant spent on advertising Applicant's Mark from the date of first use to the present." Applicant's objection that the Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence is unfounded. The amount of advertising is relevant to the *DuPont* factors, including, but not limited to, showing how extensively, if at all, Applicant has promoted Applicant's Mark and the opportunity for actual confusion to occur in the marketplace. Accordingly, Applicant must supplement its response to this Interrogatory.

Interrogatory No. 14:

Interrogatory No. 14 seeks “the trade channels, such as retail stores and other outlets, through which Applicant’s Goods have been sold [...]” Applicant’s response that its beer has been sold in “stores, restaurants, and bars” does not identify the types of stores where Applicant’s beer has been sold. Thus, Applicant’s response is incomplete and must be supplemented.

Interrogatory No. 16:

Interrogatory No. 16 seeks “the type of individual and demographic to which you market or aim to market” Applicant’s goods. Applicant’s response that its goods are “sold to consumers of craft beer” does not sufficiently identify its target demographics. Applicant must therefore supplement its response to this Interrogatory.

Interrogatory No. 17:

Interrogatory No. 17 seeks the “circumstances under which Applicant first became aware of Opposer’s Marks...” Applicant’s response that “it does not know the date when it first saw one of Opposer’s products and/or marketing materials” is not a complete response. Applicant must have knowledge of the approximate time it became aware of Opposer’s Mark or its marketing materials. Accordingly Applicant’s response is incomplete and must be supplemented.

Interrogatory No. 27:

Interrogatory No. 27 seeks “all searches...conducted by Applicant...concerning Applicant’s Mark.” Applicant’s response that it conducted “general searches and/or research prior to developing Applicant’s Mark” is incomplete as it does not identify the nature of the searches (i.e., whether such searches were conducted on the USPTO database, running searches on a search engine such as Google, etc.). Thus, Applicant must supplement its response to this Interrogatory.

Interrogatory No. 28:

Interrogatory No. 28 asks Applicant to “[d]escribe any...surveys, polls, market research.....regarding Applicant’s Goods...” Applicant objected to this interrogatory and did not provide any substantive response. The information sought by this interrogatory is relevant several of the *DuPont* factors, for example, the commercial impression of Applicant’s Mark, Applicant’s trade channels or potential trade channels, and the conditions under which sales of Applicant’s Goods are made. Thus, Applicant must supplement its response to this Interrogatory.

III. Summary

Pursuant to T.B.M.P. § 408.01, Fed. R. Civ. P. 37 and 37 CFR § 2.120(e)(1), Opposer requests a meet and confer to discuss the deficiencies outlined above in Applicant’s responses to Opposer’s First Set of Interrogatories and First Set of Requests for Production. We are available to meet and confer to discuss these issues by telephone on May 6, 2015 at 3 pm Pacific time or May 7, 2015 at 1 pm Pacific time. Please let me know if one of these times works for you. If not, please suggest alternative times this week that you are available. In view of the depositions that have been noticed by Opposer for the week of May 18, it is imperative that Applicant immediately produce the documents identified above and provide complete responses to Opposer’s interrogatories.



Finally, based on Applicant's recent discovery responses, Opposer intends to amend its notice of opposition to add an additional claim that Applicant did not use its mark in commerce at the time the application was filed. Please advise whether you consent to Opposer's motion to amend its notice of opposition.

Sincerely,

/Jonathan A. Menkes/

Jonathan A. Menkes, Esq.

20574927

EXHIBIT 7

WILLIAMS MULLEN

Direct Dial: 919.981.4055
rvanarnam@williamsmullen.com

May 8, 2015

Jonathan A. Menkes, Esq.
Jason Champion, Esq.
Knobbe Martens
2040 Main St., 14th Floor
Irvine, CA 92614

Re: **Monster Energy Co. v. Three Notch'd Brewing Co. LLC:
Opposition No. 91217273:**

Dear Gentlemen:

I respond on behalf of Three Notch'd Brewing Co. ("TNB") to the letter you sent May 2, 2015 on behalf of Monster Energy Co. ("MEC") regarding TNB's discovery responses. We disagree that our discovery responses and document production are deficient, but as discussed below, we may be willing to supplement in certain categories.

Initially, the burden is on MEC to establish why the requested documents and information it seeks is relevant; in most cases, MEC has failed to do so. It appears that much of your discovery you seek would be applicable to an infringement action in federal district court, but not to the matter at hand, an opposition proceeding in the TTAB. Many of MEC's discovery requests are overbroad and not likely to lead to discoverable evidence per our objections.

As you know, the TTAB is tasked only with determining if the "resembl[ance]" between the marks, as set forth in the application and registration materials, is confusingly similar, 15 U.S.C. § 1052(d). When the Board evaluates the likelihood of confusion, "it is the mark as shown in the application and as used on the goods described in the application which must be considered, not the mark as actually used by the applicant." McCarthy § 20:15. While the TTAB undertakes the *DuPont* analysis, elements like packaging and design, as well as any evidence about the actual nature of the goods, trade channels, or classes of purchasers are generally disregarded. *See id.* As such, discovery as to the actual use of the proposed mark is generally irrelevant in this proceeding. *In Re Franco Ferrari, S.R.L.*, 2009 WL 129543, at *6 (TTAB Jan. 8, 2009) ("[I]n considering the registrability of applicant's mark, [the Board] do[es] not consider the manner of actual use of applicant's mark"); *In re Viterra, Inc.*, 671 F.3d 1358, 1361 (Fed. Cir. 2012) ("Not all of the *DuPont* factors are relevant ..."). Thus,

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Page 2

MEC is not, as you contend, entitled to the broad scope of discovery it propounded, which is a transparent attempt to burden and harass TNB.

Responding more specifically to the complaints of your letter, we have produced the responsive material in TNB's possession in the categories disclosed in our Initial Disclosures. Note that several of the categories we and you identified were in anticipation of documents produced by MEC. To the extent we have additional documents in these categories that are responsive to a specific RFP, we will supplement our production.

RFP Nos. 8, 20-26, 34, 36-38, 48-50, 52, 53 and 58

TNB properly responded and objected to these Requests. First, TNB has produced certain marketing and advertising documents and it has no specific business plans responsive to this discovery. Moreover, "the opportunity for actual confusion" is not an element under *Dupont* and TNB is unaware of any actual confusion. Similarly, there is no basis for MEC to seek the broad categories of financial documents requested in RFPs 22-25, especially if the grounds for such material is to show an "opportunity for actual confusion." TNB will supplement its interrogatory response on pricing as indicated below.

Per our objections, some or all of RFPs 26, 34, 36-38 are overbroad and not likely to lead to discoverable information; that said, we have in fact produced documents responsive to RFP Nos. 36 and 38. Contrary to your argument, these Requests are not "limited to TNB's Mark or Goods." RFP 26, for example, is not so limited, and all of these Requests seek "all documents" in the subject area of the Request. Further, TNB has identified its trade channels in response to MEC's interrogatories and thus the requested material is overbroad and largely unnecessary. Further, none of the requested documents appear relevant to the *Dupont* factors, and the geographic use of the mark is irrelevant to that analysis. *In Re Jdk Select, Inc.*, 2006 WL 2414517, at *6 (TTAB Aug. 2, 2006) (the focus in an ex parte proceeding is "on the particulars of the application and registration, not actual use").

MEC's Requests 48-50 are irrelevant and/or overbroad. See, e.g. RFP 48 ("All documents and things referring or relating to any agreements that concern Applicant's Mark or any variation thereof"). More significantly, TNB does not appear to have documents responsive to these Requests as propounded and understood. To the extent TNB identifies documents it reasonably believes are responsive to these Requests it will supplement and produce them.

TNB disagrees that documents related to other enforcement efforts, lawsuits or other marks with which TNB uses with its goods are discoverable in this proceeding.

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Page 3

MEC will need to better explain its rationale for these documents, otherwise TNB will rest on its objections.

B. MEC's Unspecified Complaint That TNB Has Not Produced Any or More Documents in Certain Categories.

It is difficult for us to respond to these generalized complaints about our production without reference to what specific documents you believe are missing. Generally, we disagree that our production is lacking or deficient, and have already produced documents responsive to many of these Requests. That said, TNB will review its production and supplement as necessary, but believes it has produced the documents responsive to these Requests that are in its possession, custody or control and not equally accessible to MEC.

C. Interrogatories

Interrogatory No. 9

TNB will supplement this response with regard to the price of beer sold by TNB.

Interrogatory 10 and 13

We disagree that the financial or promotional information sought in these Interrogatories is discoverable in this opposition proceeding or that the opportunity for actual confusion is a valid grounds for MEC to seek this information. Again this discovery appears intended to prove actual use or infringement which is not applicable here.

Interrogatory No. 14

TNB will supplement its response.

Interrogatories 16 and 17

As discussed, MEC appears dissatisfied with the information that TNB has, but that is not a basis for complaints about, or compulsion of information that doesn't exist. TNB is not required to manufacture a response to satisfy these interrogatories.

Interrogatory No. 27

TNB will supplement its response.

Interrogatory No. 28

WILLIAMS MULLEN

May 8, 2015
Page 4

TNB properly objected to this Interrogatory as overbroad as it seeks “any research ... regarding Applicant’s Goods.” As propounded, this interrogatory could mean any form of research about any of the beer that TNB sells under the Mark. That is not relevant or likely to lead to the discovery of admissible evidence in this proceeding. When we discussed this Interrogatory, you appeared willing to narrow it to the types of research information provided in parentheses in the Interrogatory. Please clarify if that is the case.

Finally, in your letter you seek our consent to amend MEC’s Notice of Opposition to add an additional claim “that Applicant did not use its mark in commerce at the time the application was filed.” You later clarified that the claim will somehow contend that TNB was not using the mark on goods in interstate commerce. We see no basis for you to amend on these grounds, especially since there is such a low bar for establishing this requirement that clearly has been met. Therefore, we do not consent and would oppose such an amendment.

To the extent it would help narrow the issues, we have offered to meet and confer further on these issues.

Best Regards,

A handwritten signature in black ink, appearing to read "Robert Van Arnam / MGR".

Robert C. Van Arnam

EXHIBIT 8

From: Van Arnam, Robert C. <rvanarnam@williamsmullen.com>
Sent: Wednesday, May 13, 2015 12:51 PM
To: Jason.Champion
Cc: Bergert, Thomas; Jonathan.Menkes; Magnuson, Neil; Francie.LeonGuerrero
Subject: RE: Monster Energy Company v. Three Notch'd Brewing Company, LLC -- Opposition No. 91217273 [IWOV-IWOVRIC.FID1289419]

Jason - We understand from your email that MEC will be filing a motion to compel and that the depositions noticed for next week are cancelled and the witnesses are released for those dates. While the Board may suspend the proceedings in response to your motion, we don't believe your requested 30 day extension was warranted, especially since you waited until the very end of the discovery period to notice depositions and to raise issues as to the purported deficiencies in our discovery responses. Further, your request did not address whether MEC intended to respond to the discovery Three Notch'd served on MEC. As mentioned before, we will be supplementing our discovery responses and will continue to try to work with you to eliminate or narrow the discovery issues in dispute. We should be able to serve supplemental responses to your Interrogatories and RPD's tomorrow.

As you've seen, we have also served objections and produced documents in response to MEC's subpoena on Okay Yellow. Some of those documents appear to be documents you were seeking from Three Notch'd.

Finally, we have not heard back from you on whether you do or do not intend to amend your Notice. We would suggest that issue be addressed in advance of any rescheduled depositions. As mentioned, we do not intend to allow the witnesses to be deposed multiple times.

Thanks,
Rob

-----Original Message-----

From: Jason.Champion [mailto:Jason.Champion@knobbe.com]
Sent: Wednesday, May 13, 2015 2:49 PM
To: Van Arnam, Robert C.
Cc: Bergert, Thomas; Jonathan.Menkes; Magnuson, Neil; Francie.LeonGuerrero
Subject: RE: Monster Energy Company v. Three Notch'd Brewing Company, LLC -- Opposition No. 91217273 [IWOV-IWOVRIC.FID1289419]

Hi Robert,

The 30 day extension proposed by Monster would have allowed the parties additional time to perhaps resolve some of the parties' pending discovery disputes. Because Three Notch'd appears unwilling to agree to such an extension, MEC has no choice but to proceed with filing a motion to compel on the issues in dispute. Please supplement your production and interrogatory responses with whatever additional documents/information Applicant intends to produce by the end of the day tomorrow. MEC will re-notice all of the depositions that were scheduled for next week once the board decides Monster's motion and proceedings are resumed. Finally, I believe that my email below accurately summarizes what was discussed during our last call.

Regards,

Jason

Jason Champion
Associate
Jason.Champion@knobbe.com
949-721-5376 Direct
Knobbe
Martens
INTELLECTUAL PROPERTY LAW

five decades. one focus.
2040 Main St., 14th Fl.
Irvine, CA 92614
www.knobbe.com/jason-champion

-----Original Message-----

From: Van Arnam, Robert C. [mailto:rvanarnam@williamsmullen.com]
Sent: Tuesday, May 12, 2015 7:17 PM
To: Jason.Champion
Cc: Bergert, Thomas; Jonathan.Menkes; Magnuson, Neil; Francie.LeonGuerrero
Subject: Re: Monster Energy Company v. Three Notch'd Brewing Company, LLC -- Opposition No. 91217273 [IWOV-IWOVRIC.FID1289419]

Jason - Thanks for your email. We will consider your request for an extension, but it was premised on your threatened motion to compel and/or motion to amend your Notice which would likely result in a suspension. I asked you to confirm by tomorrow noon EDT whether you intended to file those. Please let us know.

My disagreements with your attempted summary of our discussion are too extensive to list. We have in good faith responded to your discovery, agreed to supplement where appropriate and pointed out the fundamental disagreement we have as to the scope of discovery in this (or any) opposition proceeding.

Best,
Rob

On May 12, 2015, at 9:43 PM, Jason.Champion
<Jason.Champion@knobbe.com<mailto:Jason.Champion@knobbe.com>> wrote:

Hi Robert,

Thank you for taking the time to speak to me today. As I suggested during our conversation, MEC proposes that the parties agree to a 30 day extension of the current opposition dates. This will allow the parties additional time to see if they can resolve some of the discovery issues that remain in dispute. Moreover, given that it appears that Applicant will not be providing by tomorrow (as previously requested by MEC) all of the additional documents/information it intends to provide, it is not practical for MEC to proceed with the

depositions scheduled for next week. A 30 day extension would allow additional time for Applicant to provide the additional documents and information it has agreed to provide and for MEC to review them prior to the depositions taking place. Please let me know by the end of the day tomorrow whether you will agree to a 30-day extension.

Below please also find a summary of our discussions from today's call relating to the discovery disputes outlined in our May 1, 2015 letter.

MEC's Document Requests where Applicant's Objections and Responses refused to produce documents

* Request Nos. 8, 20, 21, 34, 36-38:

o You're maintaining your refusal to produce any documents responsive to these requests, but also believe that no documents responsive to these requests exist and will confer with your client to confirm if that is the case

* Request Nos. 22-26, 52-53, 58

o You're maintaining your refusal to produce any documents responsive to these requests

* Request Nos. 48-50

o You do not believe that any documents responsive to these requests exist, but to the extent you identify any such documents, you will produce them

MEC's Document Requests where Applicant's Objections and Responses agreed to produce documents

* Request Nos. 1, 4, 5, 14

o You have checked with your client and believe that all documents responsive to these requests have been produced

* Request No. 9

o You indicated that with the exception of documents reflecting public recognition of the trademark (category 4) all responsive documents in your possession that fall within the categories listed on page 3 of your initial disclosures have been produced. You agreed to produce any additional documents reflecting public recognition of the trademark.

* Request Nos. 12-13

o You agreed to confer with your client regarding these requests and said that you may supplement your production to include additional responsive documents

* Request No. 15

o You agreed to produce documents sufficient to identify all forms in which your beer is sold (i.e. growlers, kegs, six packs etc.) and the prices of each form

* Request No. 16

o You confirmed that documents responsive to this request have already been produced. Please identify those documents in your production.

* Request No. 17

o Despite your written response to this request, you are now refusing to produce all documents responsive to this request

* Request No. 27

o You confirmed that all documents responsive to this request have been produced and any additional documents in your possession relating to advertising marketing and/or promotion of Applicant's Mark or of Applicant's Goods are duplicative of the documents produced

* Request Nos. 28-30

o You indicated that additional documents responsive to these requests may exist and that you will confer with your client and supplement your production accordingly

* Requests Nos. 31, 35

o You confirmed that all documents responsive to these requests have been produced

* Request No. 44

o You confirmed that your client has searched for documents responsive to this request and was unable to locate any non-privileged documents

* Request No. 54

o You do not believe that any documents responsive to this request exist but will supplement your production if responsive documents are located

* Requests No. 56-57

o You confirmed that all documents you intend to rely on in this proceeding have been produced or will be included in your supplemental production

MEC's Interrogatories

o Interrogatory No. 9

- o You indicated that you will supplement your response to include the price of goods for each form in which Three Notch'd sells and distributes its beer
- o Interrogatories Nos. 10 and 13
- o You maintained your refusal to respond to these interrogatories on the basis of relevancy
- o Interrogatory No. 14
- o You indicated that you will supplement your response to include the trade channels retail stores and other outlets where your goods are sold and/or reference documents in your production that contain such information
- o Interrogatories Nos. 16 and 17
- o You maintained your refusal to supplement these interrogatories on the basis that your client has no additional information to provide
- o Interrogatory No. 27
- o You indicated that you will supplement your response to include more information regarding the types of searches conducted by Applicant concerning Applicant's Mark
- o Interrogatory No. 28
- o You do not believe your client has engaged in any surveys, polls or market research regarding your client's goods but will confer with your client and supplement your response to this interrogatory accordingly

Regards,

Jason

Jason Champion

Associate

Jason.Champion@knobbe.com<mailto:Jason.Champion@knobbe.com>

949-721-5376 Direct

Knobbe

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five decades. one focus.

2040 Main St., 14th Fl.

Irvine, CA 92614

www.knobbe.com/jason-champion<<http://www.knobbe.com/jason-champion>>

From: Van Arnam, Robert C. [mailto:rvanarnam@williamsmullen.com]

Sent: Tuesday, May 12, 2015 8:55 AM

To: Jason.Champion

Cc: Bergert, Thomas; Jonathan.Menkes; Magnuson, Neil; Francie.LeonGuerrero

Subject: RE: Monster Energy Company v. Three Notch'd Brewing Company, LLC -- Opposition No. 91217273 [IWOV-IWOVRIC.FID1289419]

Jason - Can you talk at 4 pm EDT today? Rob

From: Jason.Champion [mailto:Jason.Champion@knobbe.com]

Sent: Monday, May 11, 2015 8:50 PM

To: Van Arnam, Robert C.

Cc: Bergert, Thomas; Jonathan.Menkes; Magnuson, Neil; Francie.LeonGuerrero

Subject: RE: Monster Energy Company v. Three Notch'd Brewing Company, LLC -- Opposition No. 91217273 [IWOV-IWOVRIC.FID1289419]

Hi Robert,

Thank you for your letter. Please let me know what time you're available tomorrow to discuss.

Regards,

Jason

Jason Champion

Associate

Jason.Champion@knobbe.com<<mailto:Jason.Champion@knobbe.com>>

949-721-5376 Direct

Knobbe

Martens

INTELLECTUAL PROPERTY LAW

five decades. one focus.

2040 Main St., 14th Fl.

Irvine, CA 92614

www.knobbe.com/jason-champion<<http://www.knobbe.com/jason-champion>>

From: Magnuson, Neil [mailto:nmagnuson@williamsmullen.com]

Sent: Friday, May 08, 2015 1:50 PM

To: Jonathan.Menkes; Jason.Champion

Cc: Bergert, Thomas; Van Arnam, Robert C.

Subject: Monster Energy Company v. Three Notch'd Brewing Company, LLC -- Opposition No. 91217273
[IWOV-IWOVRIC.FID1289419]

Jonathan and Jason,

Attached please find a letter on behalf of Robert Van Arnam. A hard copy has been sent as well.

Best regards,
Neil Magnuson

Neil Magnuson
Attorney
Williams Mullen
301 Fayetteville Street, Suite 1700
P.O. Box 1000 (27602)
Raleigh, NC 27601
T 919.981.4316
F 919.981.4300
nmagnuson@williamsmullen.com<mailto:nmagnuson@williamsmullen.com>
www.williamsmullen.com<http://www.williamsmullen.com/>

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